SUPREME COURT OF THE UNITED STATES.

No. 315.

MILES SELLS, ADMINISTRATOR OF JOHN K. ELGEE, PLAINTIFF IN ERROR,

vs.

OLIVER LOVELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MISSOURI.

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a UNITED STATES OF AMERICA, *ss:*

[L. S.] The President of the United States to the honorable the judges of the circuit court of the United States for the districts of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at October term, A. D. 1865, between Miles Sells, administrator of John K. Elgee, as plaintiff, and Oliver Lovell, as defendant, a manifest error hath happened, to the great damage of the said Miles Sells, administrator of John K. Elgee, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of of right and according to the laws and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this twenty-third day of October, in the year of our Lord one thousand eight hundred and sixty-five.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the district of Missouri, dated as aforesaid.

BEN. F. HICKMAN,
Clerk C. C. U. S., Missouri District.

[50 ct. rev. stamp, cancelled.]

Allowed by—

SAMUEL TREAT, *Judge.*

UNITED STATES OF AMERICA, *Districts of Missouri, sct:*

In obedience to the within writ of error, I hereby send a certified copy of the record and proceedings in the case of Miles Sells, administrator of John K. Elgee, against Oliver Lovell, in the circuit court of the United States for the districts of Missouri, this thirty-first day of October, A. D. eighteen hundred and sixty-five.

BEN. F. HICKMAN,
Clerk of said Court.

1 MISSOURI DISTRICTS, *sct:*

Pleas before the honorable the judges of the circuit court of the United States for the districts of Missouri, October term, A. D. 1865.—John K. Elgee, plaintiff, *vs.* Oliver Lovell, defendant.

Be it remembered, that on the 3d day of October, A. D. 1864, the following order in this cause was made, to wit:

sworn, on his oath states that said plaintiff, John K. Elgee, is the owner of the property in said petition in this suit claimed and described particularly, viz: Five hundred and seventy-two bales of cotton, lying on the levee between Walnut and Elm streets, in the city of St. Louis; that the same is wrongfully detained by this defendant; that the actual value thereof is two hundred and seventy-five thousand dollars; that the said property has not been seized under any process, execution, or attachment against the property of the plaintiff; and that the said plaintiff will be in danger of losing his said property unless it be taken out of the possession of defendant or otherwise secured; that said property was wrongfully taken, and said plaintiff's right of action accrued within one year.

MILES SELLS.

Sworn to and subscribed before me this 13th day of June, 1864.

STEPHEN RICE,
Clerk St Louis Circuit Court.

And thereupon an order of delivery was made, in the words and figures following, to wit:

Or. of delivery.

In the St. Louis circuit court, September term, 1864.

JOHN K. ELGEE
vs.
OLIVER LOVELL. } No. 81.—Order for delivery.

The plaintiff comes and files a petition and affidavit according to law, claiming the possession of certain personal property therein described. Wherefore it is ordered that the said defendant deliver the property specified in said petition to the sheriff of St. Louis county, and said sheriff of St. Louis county is hereby directed, if said property is not delivered to him, to take it from the defendant and deliver it to plainiiff.

JAMES C. MOODEY, *Judge.*

Witness Stephen Rice, clerk of the St. Louis circuit court, with the seal thereof hereto affixed, at office, in Saint Louis, this 13th day of June, one thousand eight hundred and sixty-four.

[SEAL.] S. RICE, *Cl'k.*

6 *Bond of plaintiff.*

Know all men by these presents that we, John K. Elgee and Miles Sells, as principal, and Edgar Ames, Henry Ames, John How, and Napoleon Mullikin, as securities, are held and firmly bound unto Oliver Lovell in the just and full sum of five hundred and fifty thousand dollars, to the payment whereof we bind ourselves, our heirs, executors, and administrators jointly and severally firmly by these presents. Sealed with our seals and dated at St. Louis this day of June, A. D. 1864.

The condition of the above obligation is as follows: Whereas the said John K. Elgee has commenced a suit in the St. Louis circuit court against said Oliver Lovell, returnable to the September term, 1864, of said court, for the recovery of certain personal property described in the petition of said plaintiff as follows, to wit, five hundred and seventy-two bales of cotton, lying on the levee in the city of St. Louis, and between Walnut street and Elm street in said city and the continuation thereof to the Mississippi river, and lying in one lot; and an order has been made in said cause by honorable James C. Moody, judge of the said court, requiring the said defendant to deliver the said property above described to the sheriff of the county of St. Louis, and if the same be not delivered, that the said sheriff take the same from the said defendant and deliver it to said plaintiff:

7 Now if the said John K. Elgee, plaintiff, shall prosecute the said action with effect and without delay for the return of the property to the defendant, if return thereof be adjudged, and, in default of such delivery, for the payment of the accrued value of such property and for the payment of all damages for the taking and detention thereof, and for all costs which may accrue in the action, then this obligation to be null and void; otherwise, to remain in full force and virtue.

JOHN K. ELGEE, [SEAL.]
By his attorney, MILES SELLS.
MILES SELLS. [SEAL.]
EDGAR AMES. [SEAL.]
HENRY AMES, [SEAL.]
By EDGAR AMES, *his Attorney.*
JOHN HOW. [SEAL.]
N. MULLIKIN. [SEAL.]

STATE OF MISSOURI, *County of St. Louis, ss:*

The securities in the above obligation being duly sworn, upon their oaths say that they are residents and householders in the State of Missouri, and that they are worth the amount for which said bond is given, exclusive of property exempt from execution, and after paying all just debts.

EDGAR AMES.
N. MULLIKIN.
JOHN HOW.

Sworn and subscribed before me this 13th day of June, 1864.
ROBERT WHITE,
Clerk of the Land Court,
By CHAS. LEVY, *D. C.*

8 *Sh'ff's return on or. delivery.*

On the order of sale above recited appear the following indorsements, to wit:

"The sheriff will return the above order unexecuted.

"GLOVER & SHEPLEY.
"HENRY HITCHCOCK,
"*Att'ys for s'd Pl'ffs.*"

"This order is returned unexecuted by order of plaintiff's attorney.

"JOHN C. VOGEL, *Sh'ff.*
"BRYAN CROSS, *D.*"

And afterwards, to wit, on the eleventh day of July, A. D. eighteen hundred and sixty-four, in open court, it being the continuation of the February term of said St. Louis circuit court for the year 1864, a petition and bond were filed in said cause, in the words and figures following, to wit:

Petition for removal of cause to U. S. cir. c't.

In the St. Louis circuit court, September term, 1864.

JOHN K. ELGEE
vs. } No. 81.
OLIVER LOVELL.

To the St. Louis circuit court:

Oliver S. Lovell, the defendant in this suit, sued by the name of Oliver Lovell, comes and enters his appearance in said suit, and states to the court that this action was instituted by the plaintiff for the recovery of the possession of five hundred and seventy-two bales of cotton, which, at the time of the institution of said action and of the service of the summons therein upon him, were in his possession as
9 an agent of the government of the United States, and were claimed by the United States as abandoned property under the provisions of an act of Congress approved March 12, 1863, entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States;" that the plaintiff claims said five hundred and seventy-two bales of cotton were, at the institution of said action, his property, and were wrongfully detained from him by the defendant; that in detaining the same defendant acted solely as an agent of the United States and not at all in his private capacity; that the trial of said action necessarily involved the consideration and determination of the character and legal sufficiency of acts done during the present rebellion by persons acting by virtue or under color of authority derived from and exercised under laws enacted by the Congress of the United States, and therefore that this action is within the terms of the act of Congress approved March 3, 1863, entitled "An act relating to habeas corpus and regulating judicial proceedings in certain cases," which act provides for the removal of suits in certain cases

from State courts to United States courts. And in pursuance of the fifth section of said last-mentioned act this defendant prays the court that this cause may be removed from this court for trial to the next circuit court of the United States in and for the districts of
10 Missouri, which court is by law of the United States statedly held in the eastern judicial district of the State of Missouri, within the limits of which district this court is also held.

OLIVER S. LOVELL,
By his attorney, C. D. DRAKE.

Oliver S. Lovell, defendant, makes oath and says that the foregoing petition is true.

OLIVER S. LOVELL.

Sworn to and subscribed before me this 6th day of July, 1864.
JOHN C. H. CUNNINGHAM,
Justice of the Peace.

Bond of def't.

We, Oliver S. Lovell, as principal, and Benjamin R. Bonner, as security, acknowledge ourselves indebted to John K. Elgee in the sum of five hundred dollars, to the payment of which well and truly to be made we jointly and severally bind ourselves and our respective heirs, executors, and administrators firmly by these presents. Sealed with our seals and dated this 6 day of July, eighteen hundred and sixty-four.

This obligation is subject to the following condition: Whereas the said John K. Elgee did, on the 11 day of June, eighteen hundred and sixty-four, institute an action in the St. Louis circuit court against the said Oliver S. Lovell, being No. 81 of the returns to the September term, 1864, of said court; and whereas the said Lovell has filed in said court a petition stating the facts and verified by affidavit for the removal of said cause for trial at the next circuit court of
11 the United States in and for the districts of Missouri:

Now if the said Lovell shall, on the first day of the next session of said circuit court of the United States in and for the districts of Missouri, file in said court copies of the process and other proceedings against him in said cause in said St. Louis circuit court, and also appear to said action in said circuit court of the United States, then this obligation to be void; otherwise, to remain in force.

OLIVER S. LOVELL. [SEAL.]
B. R. BONNER. [SEAL.]

And thereupon, on the said 11th day of July, 1864, an order was made by said St. Louis circuit court, in the words and figures following, to wit:

Or. removing cause to U. S. cir. c't.

JOHN K. ELGEE
vs.
OLIVER LOVELL.

Now at this day comes the defendant, by his attorney, and files a petition, duly verified by affidavit, for removal of this cause for trial

at the next circuit court of the United States in and for the districts of Missouri; and also files a bond, conditioned according to law, in the sum of five hundred dollars, with himself as principal and Benjamin R. Bonner as surety, which bond is approved by the court; and it is ordered by the court that this cause be removed and transferred for trial to the circuit court of the United States in and for the districts of Missouri.

12 STATE OF MISSOURI, *County of St Louis, ss:*

I, the undersigned clerk of the St. Louis circuit court, certify the foregoing to be a true transcript of the record and proceedings of said court in the case of John K. Elgee against Oliver Lovell, as the same remain of record and on file in my office.

In witness whereof, I hereto set my hand and affix the seal of said court, at office, July 20, 1864.

[SEAL.] S. RICE, *Cl'k.*

[Five cent rev. stamp.]

And afterwards, on the 4th day of October, A. D. 1864, the following further order was made, to wit:

Order allowing def't to enter his appearance.

JOHN K. ELGEE, plaintiff,
agst.
OLIVER LOVELL, defendant.

This day came again the defendant, by attorney, and the court being advised of and concerning the application of said defendant to enter his appearance to the action of plaintiff as brought into this court by change of venue from the St. Louis circuit court, and as shown by the record filed herein on yesterday, now orders that this case be placed on the docket of this court, under and by virtue of the laws of the United States in relation to the change of venue of certain cases from State to United States courts; and further orders that said defendant be allowed to enter his appearance to said action, which is done by William N. Grover, esquire, his attorney.

13 And afterwards, on the 15th day of October, A. D. 1864, the following further order was made, to wit:

Order allowing amended declaration.

JOHN K. ELGEE, plaintiff,
agst.
OLIVER LOVELL, defendant. } Detinue.

This day comes the plaintiff, by attorney, and, with the leave of the court, filed his amended or additional declaration herein, which declaration is as follows:

Amended declaration.

In the circuit court of the United States for the district of Missouri.

JOHN K. ELGEE, plaintiff, *against* OLIVER LOVELL, defendant. } Removed from the St. Louis circuit court under the acts of Congress.

DISTRICT OF MISSOURI, *ss:*

John K. Elgee, the said plaintiff, by leave of the court first had and obtained, for an amended declaration in this cause complains of Oliver Lovell, the said defendant, of a plea that he render to the said plaintiff certain goods and chattels of the said plaintiff of great value, to wit, of the value of four hundred and fifty thousand dollars, which he unjustly detains from him; for that whereas the said plaintiff, heretofore, to wit, on the first day of June, eighteen hundred and sixty-four, at the districts aforesaid, delivered to said defendant
14 certain goods and chattels, to wit, five hundred and seventy-two bales of cotton, at the commencement of this suit lying on the levee in the city of St. Louis, Missouri, at or near the foot of Walnut street, in said city, each of said bales being marked by numbering the same, to wit, by the numbers from 1 to 572, both inclusive, marked or painted thereon in numerical order, of and belonging to said plaintiff, of great value, to wit, of the value of four hundred and fifty thousand dollars, to be delivered by the said defendant to said plaintiff when he, the said defendant, should be thereunto afterwards requested; yet the said defendant, although he was afterwards, to wit, on the day and year aforesaid, at the said districts, requested by the said plaintiff so to do, hath not as yet delivered the said goods and chattels, or any of them, or any part thereof, to said plaintiff, but hath hitherto wholly neglected and refused, and still doth neglect and refuse, so to do, and still unjustly detains the same from said plaintiff, to wit, at the districts aforesaid, to the damage of the plaintiff of four hundred and fifty thousand dollars, and therefore he brings this suit.

(Signed) GLOVER & SHEPLEY, *P'ff's Att'ys.*

And afterwards, on the 8th day of April, A. D. 1865, the following further order was made, to wit:

Order suggesting death of pl'ff, and allowing suit to be revived in name of adm'r.

JOHN K. ELGEE, plaintiff, *agst.* OLIVER LOVELL, defendant. } Removed from St. Louis circuit court.

15 This day comes John R. Shepley, esquire, one of the attorneys in this case, and suggests to the court that since the last term thereof, John K. Elgee, the plaintiff herein, has departed this life, and that Miles Sells has taken out letters of administration in this State upon the effects and estate of said Elgee, and, with the

leave of the court, files a paper signed by said Sells, entering his appearance herein, and asking that this suit may be revived in his name as the administrator of the said John K. Elgee, which is allowed by the court; which appearance is as follows:

Appearance of adm'r.

In the circuit court of the United States for the district of Missouri.

JOHN K. ELGEE
vs.
OLIVER LOVELL.

I, Miles Sells, administrator of the estate of John K. Elgee, plaintiff, deceased, appointed by the probate court of St. Louis, county and State of Missouri, do hereby enter my appearance in said suit, and ask that the same may be revived in his name.

(Signed) MILES SELLS.

And afterwards, on the 10th day of April, A. D. 1865, the following further order was made, to wit:

Order allowing def't time to plead.

JOHN K. ELGEE, plaintiff,
agst.
OLIVER LOVELL, defendant.
} Removed from St. Louis circuit court.

This day comes the defendant, by attorney, and on his motion it is ordered that the said defendant have two days further time
16 within which to file his plea herein.

And afterwards, on the 12th day of April, A. D. 1865, the following further order was made, to wit:

Order filing plea in abatement.

JOHN K. ELGEE'S ADMINISTRATOR, plaintiff,
agst.
OLIVER LOVELL, defendant.
} Removed from St. Louis circuit court.

This day come the parties, by attorneys, and the defendant, by attorney, files his plea in abatement to the action of plaintiff herein against him; to which plea the plaintiff, by attorney, files his demurrer.

The following is the plea referred to above :

Plea in abatement.

In the circuit court of the United States for the districts of Missouri, of the April term, A. D. 1865.

MILES SELLS, administrator of John K. Elgee, plaintiff,
vs.
OLIVER LOVELL, defendant.

UNITED STATES OF AMERICA, *Districts of Missouri, ss :*

And the said defendant, in his own proper person, comes and says that this court ought not to have or take further cognizance of the action aforesaid, because he says that the said five hundred and seventy-two bales of cotton, for the recovery of which said action was brought, was, at the time of the commencement of this suit and for the issue and service of the writ of summons in said cause, in the
17 possession of the said defendant as agent of the United States, and such possession was held by this defendant as agent for the United States, and not otherwise ; that said defendant was, at the time of the commencement of this suit and of the issue and service of said writ and summons, an agent of the United States, acting under authority of an act of Congress to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States, approved March 12, 1863, and as such agent then had possession of said cotton for the United States, said cotton then and there being claimed by the United States as abandoned property, under the act of Congress aforesaid ; and that the said possession was for and on behalf of the United States, the said defendant acting solely for the United States ; and that whatever claim, if any, the said plaintiff may have to said property, is properly cognizable, in and should be presented and prosecuted in, the Court of Claims of the United States, and not in this court ; and this the said defendant is ready to verify. Wherefore he prays judgment whether this court can or will take further cognizance of the action aforesaid.

(Signed) OLIVER S. LOVELL.

Affidavit waived.
GLOVER & SHEPLEY, *Att'y for Pl'ff.*

The following is the demurrer referred to above:

18 *Demurrer to plea in abatement.*

In the circuit court of the United States for the districts of Missouri.

MILES SELLS, administrator of John K. Elgee,
vs.
OLIVER LOVELL.

DISTRICTS OF MISSOURI, *ss :*

And now comes the said plaintiff, and *and* says that the plea by said defendant pleaded, and the matters and things therein contained in

manner and form as above pleaded, are not sufficient to quash said writ in said cause, and said plaintiff is not bound by law to answer the same, and this he is ready to verify. Wherefore for want of a sufficient plea plaintiff prays judgment, and that said defendant may answer further to said declaration.

GLOVER & SHEPLEY.
HITCHCOCK, *Att'y for Pl'ff.*

And afterwards, on the 21st day of April, A. D. 1865, the following further order was made, to wit:

Order sustaining demurrer to plea in abatement.

JOHN K. ELGEE'S ADMINISTRATOR, plaintiff,
agst.
OLIVER LOVELL, defendant.
} Removed from St. Louis circuit court.

This day come again the parties, by attorneys, and the court having examined the questions of law arising upon the demurrer filed by plaintiff to the plea in abatement of defendant herein, and being advised of and concerning the same, is of opinion that the law is for the plaintiff on said demurrer, and in accordance with such opinion, now orders that said demurrer be and the same is hereby sustained,
19 and that said plea in abatement be adjudged insufficient herein, and that said defendant be required to plead or answer further to the said action of plaintiff against him.

And afterwards, on the 22d day of April, A. D. 1865, the following further order was made, to wit:

Order allowing time to def't to file plea.

JOHN K. ELGEE'S ADMINISTRATOR, plaintiff,
against
OLIVER LOVELL, defendant.
} Removed from St. Louis circuit court.

This day come the parties, by attorneys, and, by consent, it is ordered that the defendant have leave to file his plea to the declaration of plaintiff herein by the next term of this court.

And on the 28th day of September, A. D. 1865, the following plea was filed, to wit:

Plea of defendant to jurisdiction of the court.

In the circuit court of the United States in and for the districts of Missouri, October term, 1865.

MILES SELLS, administrator of John K. Elgee,
vs.
OLIVER LOVELL.

And the said defendant, in his own proper person, comes and says that this court ought not to have or take further cognizance of the action aforesaid, because, he says, that the said five hundred and

seventy-two bales of cotton, for the recovery of which this action was instituted, had, prior to the institution of said action, to wit, in the month of March, eighteen hundred and sixty-four, in the State of Mississippi, been taken, received, and collected as abandoned property, into the possession of one Ralph S. Hart, a special agent appointed by the Secretary of the Treasury to receive and collect abandoned or captured property in said State, in pursuance of the terms of the first section of an act of Congress entitled "An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States," approved March 12, 1863; that prior to the time when the said cotton was taken, received, and collected into the possession of the said Ralph S. Hart, special agent as aforesaid, the said State of Mississippi had been, by the proclamation of the President of the United States, of July first, eighteen hundred and sixty-three, designated as in insurrection against the lawful government of the United States; that the said cotton was, in pursuance of the second section of the act aforesaid, forwarded by the said Ralph S. Hart, special agent as aforesaid, who had received and collected the same from the said State of Mississippi, to a place of sale within the loyal States, and in the course of being so forwarded, came, at the city of St. Louis, in the State of Missouri, into the possession of this defendant as agent of the United States, and at the time of the institution of this action, and the issue and service of the summons therein, was in the possession and custody of this defendant as such agent, and not otherwise; that the possession and custody of said cotton by this defendant, at the time of the institution of this action, and the issue and service of the summons therein, was in pursuance of the act aforesaid; that this defendant then and there held such possession and custody for and on behalf of the United States, and not otherwise; that the said cotton was then and there claimed by the United States as abandoned property under the act aforesaid, and is still so claimed; that prior to the time when said cotton was so taken, received, and collected as aforesaid into the possession of said Ralph S. Hart, special agent as aforesaid, the State of Louisiana, except certain named parts thereof, had, by the aforesaid proclamation of the President of the United States, been designated as in insurrection against the lawful government of the United States; that at the time the said cotton was so taken, received, and collected into the possession of said Ralph S. Hart, special agent as aforesaid, and at the time the same came into the possession of this defendant as aforesaid, and at the time this action was instituted and the summons therein issued and served, the said John K. Elgee, then in his lifetime, since deceased, was, and for many years prior thereto had been, a resident of the said State of Louisiana, in that part of said State which was by the aforesaid proclamation of the President of the United States designated as in insurrection against the lawful government of the United States; and that whatever claim, if any, the said John K. Elgee, in his lifetime may have had, or the said plaintiff as his administrator may have, to said cotton, is properly cognizable before and should be

presented and prosecuted in the Court of Claims of the United States, and not in this court; and this the said defendant is ready to verify; wherefore he prays judgment whether this court can or will take further cognizance of the action aforesaid.

OLIVER S. LOVELL.

The oath of defendant to the foregoing plea is waived.

GLOVER & SHEPLEY, *Att'ys for Pl'ff.*

And on the 29th September, A. D. 1865, the following demurrer was filed, to wit:

Demurrer to plea to jurisdiction.

In the circuit court of the United States for the districts of Missouri.

MILES SELLS, administrator of John K. Elgee,
vs.
OLIVER LOVELL.

And now comes the said plaintiff, and as to the amendment plea of the defendant by him above pleaded, says that the same and the matters and things therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him, the said plaintiff, from having or maintaining his aforesaid action thereof against the said defendant, and that he, the said plaintiff, is not bound by law to answer the same, and this he is ready to verify. Wherefore, by reason of the insufficiency of the said plea in this behalf, said plaintiff prays judgment, and for damages, as is in his said declaration set forth to be adjudged him, &c.

23 GLOVER & SHEPLEY, *Att'y for Pl'ff.*

And afterwards, on the 2d day of October, A. D. 1865, the following further order was made, to wit:

Order filing motion for security for costs.

JOHN K. ELGEE'S ADMINISTRATOR, plaintiff,
ag'st
OLIVER LOVELL, defendant.
Removed from Saint Louis circuit court.

This day comes the defendant, by attorney, and files his motion in writing, asking the court to require the plaintiff to execute a bond for the costs in this case, which motion, being examined by the court, is allowed, and said plaintiff ordered forthwith to execute the necessary bond for such costs; which motion is as follows:

Motion for security for costs.

In the circuit court of the United States for the districts of Missouri, October term, 1865.

MILES SELLS, administrator of John K. Elgee,
vs.
OLIVER LOVELL.

Now comes the said defendant, by his attorney, and says that there

is danger of the defendant losing the benefit of whatever judgment he may obtain for costs, if this suit should be decided in favor of the plaintiff, unless plaintiff be required to give security for costs; that plaintiff is prosecuting this suit in his representative capacity as administrator of the estate of John K. Elgee, by whom said suit was originally brought; that said Elgee at the time of bringing said
24 suit was, and up to the time of his death continued to be, a citizen and resident of the State of Louisiana, and had not at the time of bringing said suit or at any time since, nor has his administrator, any property or assets in this State, unless a recovery be had in this suit; wherefore defendant moves for a rule against plaintiff requiring him to give security for costs.

HUGHES, DRAKE, GROVER,
Att'ys for Def't.

And afterwards, on the 3d day of October, A. D. 1865, the following further order was made, to wit:

Order allowing def't to withdraw plea to jurisdiction and filing pleas 1, 2, 3, 4, *and* 5 *in bar.*

JOHN K. ELGEE'S ADMINISTRATOR, plaintiff,
ag'st
OLIVER LOVELL, defendant.
} Removed from St. Louis circuit court.

This day come the parties, by attorneys, and the defendant, by attorney, with the leave of the court, withdraws the plea to the jurisdiction of this court heretofore filed by him herein, and in lieu thereof files his pleas in bar numbered one, two, three, four, and five, and, on motion of attorney for plaintiff, three days are allowed him within which to reply to said pleas, which pleas are as follows:

In the circuit court of the United States for the districts of Missouri, October term, 1865.

OLIVER LOVELL
ats.
MILES SELLS, adm'r of John K. Elgee.

25 *Pleas in bar, No.* 1.

1. And the said defendant, by Drake, Grover & Hughes, his attorneys, comes and defends the wrong and injury, when, &c., and says that he does not detain the said cotton in the said declaration mentioned, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him, and of this he, the said defendant, puts himself upon the country, &c.

J. L. HUGHES, C. D. DRAKE, and W. N. GROVER,
Attorneys for Def't.

No. 2.

2. And for further plea in this behalf the said defendant says that the plaintiff ought not to have and maintain his aforesaid action there-

of against him, because he says that before and at the time of the committing the grievances in the said declaration complained of, and before and at the time of the commencement of this suit, the said John K. Elgee, the original plaintiff herein, was a resident of the State of Louisiana, the people whereof were then and now are in insurrection against the United States and at war with the same, and that the said Elgee was then and there in rebellion against the lawful government of the United States, and did then and there adhere to and aid and acknowledge allegiance to the so-called Confederate States of America, then waging war against the United States of America, and was then and there a public enemy of the United States, and not a loyal citizen thereof; and this the defendant is ready
26 to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid said action thereof against him.

J. L. HUGHES, C. D. DRAKE, and WM. N. GROVER,
Def'ts' Attorneys.

No. 3.

3. And for a further plea in this behalf the said defendant says that the said plaintiff ought not to have and maintain his aforesaid action thereof against him, because he says that the said John K. Elgee in his life time claimed, and this plaintiff since his death claims, the said cotton in said declaration mentioned as the property of the said John K. Elgee, wrongfully taken and detained from him, the *the* said John K. Elgee, by the agents of the United States, and not otherwise; and the said cotton was, at the commencement of this suit, and now is, claimed by the United States as abandoned property under the act of Congress approved March 12th, 1863, and that at the time of the commencement of this suit the said defendant was in possession of the said cotton in the said declaration mentioned as agent of the United States, and not otherwise; and this the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him.
27 J. L. HUGHES, C. D. DRAKE, and WM. N. GROVER,
Att'ys for Defendant.

No. 4.

4. And for a further plea in this behalf the said defendant says *actio-non*, because he says that the said goods and chattels in said declaration mentioned were, at the time of the commencement of this suit and now are the property of the United States; and this he is ready to verify. Wherefore he prays judgment, &c.

J. L. HUGHES, C. D. DRAKE, and WM. N. GROVER,
Attorneys for Defendant.

No. 5.

In the circuit court of the United States in and for the districts of Missouri, October term, 1865.

5. MILES SELLS, administrator of John K. Elgee,
vs.
OLIVER LOVELL.

And the said defendant, by his attorney, comes and defends the wrong and injury, when, &c., and says that the said plaintiff ought not to have or maintain his aforesaid action thereof against the said defendant, because he says that the said five hundred and seventy-two bales of cotton, for the recovery of which this action was instituted, had, prior to the institution of said action, to wit, in the month of March, eighteen hundred and sixty-four, in the State of Mississippi, been taken, received, and collected as abandoned property into the possession of one Ralph S. Hart, a special agent appointed
28 by the Secretary of the Treasury to receive and collect abandoned or captured property in said State, in pursuance of the terms of the first section of an act of Congress entitled "An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States," approved March 12th, 1863; that prior to the time when the said cotton was taken, received, and collected into the possession of the said Ralph S. Hart, special agent as aforesaid, the said State of Mississippi had been by the proclamation of the President of the United States of July first, eighteen hundred and sixty-three, designated as in insurrection against the lawful government of the United States; that the said cotton was, in pursuance of the second section of the act aforesaid, forwarded by the said Ralph S. Hart, special agent as aforesaid, who had received and collected the same from the said State of Mississippi to a place of sale within the loyal States, and in the course of being so forwarded, came, at the city of St. Louis, in the State of Missouri, into the possession of this defendant as agent of the United States, and at the time of the institution of this action and the issue and service of the summons therein, was in the possession and custody of this defendant as such agent, and not otherwise; that the possession and custody of said cotton by this defendant at
29 the time of the institution of this action and the issue and service of the summons therein, was in pursuance of the act aforesaid; that this defendant then and there held such possession and custody for and on behalf of the United States, and not otherwise, and that the said cotton was then and there claimed by the United States as abandoned property under the act aforesaid, and is still so claimed; and this the defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him.

J. L. HUGHES,
C. D. DRAKE,
W. N. GROVER,
Att'ys for Def't.

And afterwards, on the 6th day of October, A.D. 1865, the following further order was made, to wit:

Order filing replication to plea No. 1, and demurrer to pleas No. 2, 3, 4, and 5.

JOHN K. ELGEE'S ADMINISTRATOR, plaintiff, *ag'st* OLIVER LOVELL. } Removed from St. Louis circuit court.

This day comes the plaintiff, by attorney, and files his replication to plea numbered one, heretofore filed by the defendant herein, and also files his demurrer to the second, third, fourth, and fifth pleas filed by the said defendant in this case; and the questions of law arising upon the said demurrer were in part argued by counsel, but said arguments not being concluded at the hour of adjournment, further arguments were continued until to-morrow morning.

Which replication referred to above is as follows:

Replication to plea No. 1.

In the circuit court of the United States for the districts of Missouri.

MILES SELLS, administrator of John K. Elgee, plaintiff, *vs.* OLIVER LOVELL, defendant.

DISTRICTS OF MISSOURI, *ss:*

And now comes the said plaintiff, by his attorneys, and for replication to the plea of said defendant by him first above pleaded, whereby the said defendant puts himself upon the country, said plaintiff doth the like.

GLOVER & SHEPLEY, *Att'ys for Pl'ff.*

Which demurrer referred to above is as follows:

Demurrer to pleas No. 2, 3, 4, and 5.

In the circuit court of the United States for the districts of Missouri.

MILES SELLS, administrator of John K. Elgee, *vs.* OLIVER LOVELL.

DISTRICT OF MISSOURI:

And now comes the said plaintiff, and as to the plea of said defendant by him thirdly above pleaded, the said plaintiff says that the same and the matters and things therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him, the said plaintiff, from having or maintaining his aforesaid action thereof against said defendant, and he, said plaintiff, is not bound in law to answer the same; and this he is

ready to verify; wherefore he prays judgment; and as to the
31 plea of said defendant by him fifthly above pleaded, the said plaintiff says that the same, and the matters and things therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him, the said plaintiff, from having or maintaining his aforesaid action thereof against said defendant, and he, said plaintiff, is not bound in law to answer the same; and this he is ready to verify. Wherefore he prays judgment.

And as to the plea of the said defendant by him secondly above pleaded, the said plaintiff says, that the same and the matters and things therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him, the said plaintiff, from having or maintaining his aforesaid action thereof against said defendant, and he, the said plaintiff, is not bound in law to answer the same; and this he is ready to verify. Wherefore he prays judgment.

And as to the plea of the said defendant by him fourthly above pleaded, the said plaintiff says, that the same and the matters and things therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him, the said plaintiff, from having or maintaining his aforesaid action thereof against said defendant, and he, the said plaintiff, is not bound in law to answer the same; and this he is ready
32 Wherefore he prays judgment.

GLOVER & SHEPLEY, *Att'ys for Pl'ff.*

And, afterwards, on the 7th day of October, A. D. 1865, the following further order was made, to wit:

Order allowing joinder to demurrer.

JOHN K. ELGEE'S ADMINISTRATOR, plaintiff, *agst.* OLIVER LOVELL, defendant. } Removed from St. Louis circuit court.

This day comes the defendant, by attorney, and files his joinder in demurrer to pleas numbered two, three, four, and five heretofore filed herein. And the questions of law arising upon the said demurrer were further argued by counsel and submitted to the court, which, not being fully advised in the premises, took time to consider of its judgment herein.

Which joinder referred to above is as follows:

Joinder to demurrer.

In the circuit court of the United States for the districts of Missouri.—Oct. term, 1865.

OLIVER LOVELL *ats.* MILES SELLS, adm. of John K. Elgee.

And the said defendant says that the said plea by him secondly above pleaded is sufficient in law.

C. D. DRAKE, W. N. GROVER, and JAS. HUGHES, *Att'ys for Def't.*

And the said defendant says that the said plea by him thirdly above pleaded is sufficient in law.

DRAKE, GROVER, and HUGHES,
Att'ys for Def't.

33 And the said defendant says that the said plea by him fourthly above pleaded is sufficient in law.

DRAKE, GROVER, and HUGHES,
Def'ts' Att'ys.

And the said defendant says that the said plea by him fifthly above pleaded is sufficient in law.

DRAKE, GROVER, and HUGHES,
Def'ts' Att'ys.

And afterwards, on the 9th day of October, A. D. 1865, the following further order was made, to wit:

Order overruling demurrer as to 2 and 5 pleas, and sustaining demurrer as to 3 and 4 pleas.

JOHN K. ELGEE'S ADMINISTRATOR, plaintiff, *ag'st* OLIVER LOVELL, defendant. } Removed from St. Louis circuit court.

This day come the parties, by attorneys, and the defendant, by attorney, asked leave, before any decision or action of the court upon the demurrer herein, to amend the second plea filed by him in this case, which was allowed, and said amendment made. And the questions of law arising upon said demurrer were again submitted to the court, and the court, being now fully advised of and concerning the same, is of opinion that the law is for the defendant as to the questions arising upon said demurrer to the second and fifth pleas herein, and, in accordance with such opinion, now orders that said demurrer be, and the same is hereby overruled; and as to questions of law arising upon said demurrer to the third and fourth pleas herein, is of opinion that the law is for the plaintiff, and in accordance with such
34 opinion, now orders that said demurrer be, and the same is hereby sustained, and said pleas number three and four adjudged insufficient.

And afterwards, on the 12th day of October, A. D. 1865, the following further order was made, to wit:

Order allowing replication to 2 and 5 pleas.

JOHN K. ELGEE'S ADMINISTRATOR, plaintiff, *ag'st* OLIVER LOVELL, defendant. } Removed from St. Louis circuit court.

This day comes the parties, by attorneys, and the plaintiff, by attorney, files his replication to the second and fifth pleas heretofore filed by the defendant in this case, and the defendant, by attorney, files his demurrer to the said replication of plaintiffs herein.

Which replication referred to above is as follows:

Replication to 2d plea.

In the circuit court of the United States for the district of Missouri.

MILES SELLS, adm'r of John K. Elgee, plaintiff,
v.
OLIVER LOVELL, defendant.

DISTRICTS OF MISSOURI, *ss:*

And now comes the said plaintiff, and for replication to the plea of said defendant by him secondly above pleaded says, that the said plaintiff, by reason of anything in said plea mentioned, ought not to be barred from having and maintaining his aforesaid action thereof against the defendant, because he says that before and at the
35 time of the commencement of this suit the people of the State of Louisiana were not nor are they now in insurrection against the United States, and were not in rebellion against the lawful government of the United States, and the said John K. Elgee did not there and then adhere to or aid or acknowledge allegiance to the so-called Confederate States of America, then waging war against the United States of America, and was not there and then a public enemy of the United States, and was a loyal citizen thereof; and this the said plaintiff prays may be inquired of by the country, &c.

And defendant doth the like.

HUGHES, DRAKE, and GROVER,
Att'ys for Def't.

Replication to 2 plea.

And for a further replication to the plea of the defendant by him secondly above pleaded, the said plaintiff says that he, the said plaintiff, by reason of anything in said plea mentioned, ought not to be barred or precluded from having or maintaining his aforesaid action thereof against said defendant, because he says that the President of the United States did issue his proclamation, bearing date the eighth day of December, eighteen hundred and sixty-three, whereby there was promised a full pardon and amnesty, with restoration of all their rights of property, except as to slaves, to all those living in the said in-
36 surrectionary districts, except certain classes of persons therein mentioned, who should thereafter take, subscribe, and keep inviolate a certain oath therein prescribed, and that prior to the commencement of this suit the said John K. Elgee, then living in said insurrectionary districts, not being one of the persons excepted by the proclamation of the President of the United States aforesaid, did take and subscribe the oath required by said proclamation, which was duly registered in accordance therewith, and said John K. Elgee did from thence forth forever afterwards keep and maintain said oath inviolate, by means whereof all his rights of property in the goods, wares, and merchandise mentioned in said declaration were by the laws of the United States, and by the force of said proclamation, restored to him; and this he is ready to verify. Wherefore he prays judgment, &c.

Replication to 5 plea.

And for replication to the plea of the defendant by him fifthly above pleaded, the said plaintiff, by reason of anything in said plea mentioned, ought not to be barred or precluded from having or maintaining his aforesaid action thereof against said defendant, because he says that the said property in said declaration mentioned was, prior to and at the time it came into the possession of said Ralph S. Hart as alleged in said plea, the property of and belonged to the said John K. Elgee, and that the President of the United States did
37 issue his proclamation, bearing date the eighth day of December, eighteen hundred and sixty-three, whereby there was promised a full pardon and amnesty, with restoration of all their rights of property, except as to slaves, to all those living in the said insurrectionary districts, except certain classes of persons therein mentioned, who should thereafter take, subscribe, and keep inviolate a certain oath therein prescribed, and that prior to the commencement of this suit the said John K. Elgee, then living in said insurrectionary districts, not being one of the persons excepted by the proclamation of the President of the United States aforesaid, did take and subscribe the oath required by said proclamation as therein mentioned, which oath was duly registered in accordance therewith, and said John K. Elgee did, from thenceforth forever afterwards, keep and maintain said oath inviolate, by means whereof all his rights of property in the goods, wares, and merchandise mentioned in said declaration were by the laws of the United States and by the force of said proclamation restored to him, and the said property was so taken and held from said John K. Elgee contrary to said proclamation and the laws of the United States; and this he is ready to verify. Wherefore he prays judgment, &c.

GLOVER & SHEPLEY,
Att'ys for Pl'ff.

Which demurrer referred to above is as follows :

Demurrer to replication to 2 plea.

38 In the circuit court of the United States for the districts of Missouri.

MILES SELLS, adm'r of John K. Elgee,
vs.
OLIVER LOVELL.

And the said defendant saith that the second replication of the said plaintiff to the said second plea of the said defendant, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and that he, the said defendant, is not bound by law to answer the same.

Demurrer to replication to 5 plea.

And the said defendant saith that the replication of the said plaintiff to the said fifth plea of the said defendant, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and that he, the said defendant, is not bound by law to answer the same.

JAMES HUGHES,
WM. N. GROVER, and
C. D. DRAKE,
Att'ys for Def't.

And afterwards, on the 12th day of October, A. D. 1865, the following further order was made, to wit:

Order allowing motion to dismiss.

JOHN K. ELGEE'S ADMINISTRATOR, plaintiff,
'ag'st
OLIVER LOVELL, defendant.
} Removed from St. Louis circuit court.

39 This day come again the parties, by attorneys, and defendant, by attorney, files a motion in writing to dismiss this suit from the docket of this court, upon the grounds and for the reasons set forth in said motion; and the said motion having been argued by counsel and submitted to the court, the court, on consideration thereof, and being fully advised of and concerning the same, now orders that the said motion be, and the same is, hereby overruled; which motion referred to above is as follows:

Motion to dismiss.

In the circuit court of the United States for the districts of Missouri, October term, 1865.

OLIVER LOVELL
ats.
MILES SELLS, adm'r of John K. Elgee.

The said defendant, by his att'ys, moves that this case be dismissed for the following reasons:

1st. It does not appear in the records that this court has jurisdiction.

2d. It appears in the record that this court has not jurisdiction of the issues joined herein, and of the subject-matter of this suit.

3d. It appears in the record that this suit is brought against an officer of the United States Treasury Department for the recovery of specific goods and chattels in his custody, as such officer, and not otherwise.

4th. By an agreement duly executed by the plaintiff herein, and by his attorneys of record in this suit, on the one part, and the Solicitor of the Treasury on the other part, and approved by the
40 Secretary of the Treasury, in relation to this suit, and to the subject-matter thereof, and to the questions involved and the

judgment herein, and the issue to be tried, a copy of which said agreement is herewith filed, and the original whereof is here offered and shown to the court, and the execution of which said defendant is ready to prove, and here offers to prove in due form, it appears and is shown and admitted, that the subject-matter of this suit is such that this court has no jurisdiction of the same.

5th. Because the said plaintiff, in and by the said agreement, distinctly admits and agrees, in this cause, that he has no right of action against this defendant in this suit.

6th. Because the subject-matter of this suit is not within the jurisdiction of this court.

7th. Because after the commencement of this suit, and during the pendency of the same, the said plaintiff, without any assent or agency of the defendant, and in contempt of the authority and jurisdiction of this court in this suit, did agree and stipulate with the Solicitor of the Treasury of the United States, under the approval of the Secretary of the Treasury, that the specific goods and chattels sought to be recovered in this suit might and should be sold and converted into money, and the proceeds thereof invested in certain
41 securities, and held subject to the order of the Secretary of the Treasury of the United States, which in pursuance of said agreement was done, thereby, without the consent, agency, or authority of said defendant, disposing of and converting the specific goods herein sued for, so that a judgment herein against the said defendant could not be respected and obeyed by him, and said property rendered up to said pl'ff; for proof of which facts reference is made to the affidavit of said defendant herewith filed.

JAMES HUGHES, *Att'y for Defendant.*

Which agreement, marked A, referred to above is as follows:

Agreement marked A, referred to in motion to dismiss.

Whereas an action was brought in the circuit court of St. Louis county, and State of Missouri, on the eleventh day of June, A. D. 1864, by John K. Elgee against Oliver Lovell for the recovery of five hundred and seventy-two bales of cotton, which cotton is claimed by the United States as abandoned property under the act of Congress approved March 12th 1863, but which the said Elgee claims as his property, wrongfully taken and detained from him by the agents of the United States; and whereas it is desired that said cotton should be forthwith sold to save risk and expense connected therewith, but without prejudice to any claim set up in respect thereto:

Now, therefore, it is agreed by and between the Solicitor of the Treasury of the United States of the one part, herein acting
42 with the approval of the Secretary of the Treasury, and John K. Elgee of the other part, as follows:

First. The said action shall, without delay, be removed to the circuit court of the United States for the district of Missouri by said Lowell, under the provisions of the act of Congress approved March 3d, 1863.

Second. Said cotton shall be sold by the agent of the Treasury Department forthwith at St. Louis, at auction to the highest bidder, for cash, at which sale the agent and attorneys of said Elgee shall be present, and make public announcement that between said Elgee and the United States the matters of difference in respect to said cotton have been so arranged as that neither said Elgee or any person by him authorized will assert against any purchaser thereof any claim, on his, part, to said cotton.

Third. From the money received from said sale enough shall be reserved and applied by the agent of the Treasury Department to pay such actual and reasonable expenses connected with the care and sale of said cotton in St. Louis, and such freight on said cotton from Natchez to St. Louis, as may be agreed to by the agent or attorneys of said Elgee, or approved by the Secretary of Treasury, and also such other expenses, if any, attending the transportation of said cotton to Natchez, and such storage and other expenses chargeable to said cotton at Natchez, as said agent of the Treasury De-
43 partment shall consider proper and just: Provided, however, that said agent shall not pay any such expenses as mentioned in the last preceding clause, until after the same shall be approved by the Secretary of the Treasury, which approval shall not be given until after reasonable opportunity shall be given by him to said Elgee or his attorneys to be heard in opposition thereto.

Fourth. The remainder of the money received from said sale shall be invested in the bond of the United States known as "ten-forty bonds," with interest coupons, which bonds shall be immediately made up and sealed in a package, and such package shall be deposited with the assistant treasurer of the United States at St. Louis, as a special deposit, subject only to the order of the Solicitor of the Treasury, indorsed with the approval of the Secretary of the Treasury, for the following purposes and upon the following terms, to wit:

Said package to remain as such special deposit in the hands of said assistant treasurer of the United States until the final determination of the said action brought by Elgee against Lovell, it being expressly agreed and understood by the parties hereto that upon such final determination of said cause, if it be in favor of said Elgee, and against said Lovell, the said package shall be considered as standing in lieu of the five hundred and seventy-two bales of cotton, and if
44 the judgment of the court be for the recovery by said Elgee of the said 572 bales of cotton, or any part thereof, or for damages in lieu of the same, the *the* Solicitor of the Treasury shall order the said package, or such proportion of the bonds therein contained as shall be equivalent to the amount or proportion of said 572 bales of cotton, or damages in lieu thereof, for which judgment shall have been rendered as aforesaid, to be delivered to the said Elgee, or his authorized agents or legal representatives, which order shall, in such case, be approved as aforesaid by said Secretary, and such delivery being made, shall be deemed to be the same as the delivery of said cotton, and shall be in full satisfaction of such judgment, and of all

damages awarded in said suit, whether equal thereto in amount or not, and also in full satisfaction of all claims of said Elgee against the United States, or any officer, agent, or employee thereof, arising out of or in respect to the said 572 bales of cotton, or against any person who at any time had said cotton in possession under authority of or under contract with the United States or any of its officers, agents, or servants.

Provided, that if such delivery shall be prevented by any action or proceeding at law or in equity, in respect to said bonds, or said Elgee's interest therein, to which said cotton would, if remaining unsold, have been legally subject, then the delivery by the
45 Solicitor of the Treasury to said Elgee, or his representatives, of such order as above mentioned, approved by the Secretary as aforesaid, shall be deemed and taken to all intents and purposes as equivalent to the delivery of said bonds, or such proposition thereof as shall be embraced therein, and shall have the like effect as the delivery of the bonds themselves, as hereinafter stipulated.

Fifth. The said Solicitor of the Treasury on his part agrees that said Lovell was at the time of the issue and service of the writ of summons in said cause in possession of the said 572 bales of cotton, as agent of the United States, and not otherwise, and further agrees that the fact of such possession by him as aforesaid shall be admitted by said Lovell in said cause on the record thereof.

In witness whereof, the said parties have hereto set their hands this twenty-second day of June, A. D. 1864.

EDWARD JORDAN,
Solicitor of the Treasury.
JOHN K. ELGEE,
By MILES SELLS, *Attorney in fact.*

Approved:
S. P. CHASE, *Sec'y. Tres'y.*

GLOVER & SHEPLEY,
H. HITCHCOCK,
Attorneys and Counsel for Elgee.

Which affidavit referred to above is as follows:

Affidavit referred to in motion to dismiss.

In the circuit court of the United States for the district of Missouri, October term, 1865.

46 OLIVER LOVELL
ats.
MILES SELLS, adm'r of John K. Elgee.

Oliver Lovell, defendant in the above suit, makes oath and says, that a certain agreement in writing, a copy of which is hereto attached, marked "A," was made (as he is informed and verily believes) and executed after the commencement of this suit by the parties whose names are signed thereto, the party of the first part being the plaintiff herein; that said agreement was made and entered into without any agency or participation of his, though respected and

recognized by him as the act of his official superiors ; that after the making of said agreement, and in pursuance of the same, the cotton in controversy in this suit was sold ; whether the proceeds thereof have been yet invested in securities or not, deponent is not advised; said cotton is not now in his possession, and cannot be produced under any judgment rendered by this court.

OLIVER LOVELL.

Subscribed and sworn to by said affiant, before me, at office, in St. Louis, Mo., this 6th day of October, A. D. 1865.

F. A. WERNER,
Dep'y Clerk U. S. Cir. Court, Dist's of Missouri.

And afterwards, on the 14th day of October, A. D. 1865, the
47 following further order was made, to wit:

Order sustaining demurrer to replication to 2 and 5 pleas.

JOHN K. ELGEE'S ADMINISTRATOR, plaintiff, *ag'st* OLIVER LOVELL, defendant. } Removed from St. Louis circuit court.

This day come the parties, by attorneys, and the questions of law arising upon the demurrer heretofore filed by the defendant to the replications of plaintiff to the second and fifth pleas of said defendant herein, having been argued by counsel and submitted to the court, and the court having examined said demurrer, and being fully advised of and concerning the same, is of opinion that the law is for the defendant upon such demurrer, and in accordance with such opinion now orders that the said demurrer be and the same is hereby sustained. And on the motion of said plaintiff, by attorney, it is ordered that he have leave to amend the replications to said second and fifth pleas filed by him herein.

And afterwards, on the 17th day of October, A. D. 1865, the following further order was made, to wit:

Order allowing amended replication to 2 and 5 pleas.

JOHN K. ELGEE'S ADMINISTRATOR, plaintiff, *ag'st* OLIVER LOVELL, defendant. } Removed from St. Louis circuit court.

This day come the parties, by attorneys, and the plaintiff, by attorney, files his amended replication to the second and fifth pleas heretofore filed by the defendant in this case, and thereupon
48 the said defendant, by attorney, files his demurrer to said amended replication herein. And the questions of law arising upon said demurrer were argued by counsel for defendant and submitted to the court, and the court not being fully advised in the premises, took time to consider of its judgment herein.

Which replication referred to above is as follows:

Amended replication to 2 plea.

In the circuit court of the United States for the districts of Missouri.

MILES SELLS, administrator of John K. Elgee, deceased, plaintiff,
vs.
OLIVER LOVELL, defendant.

DISTRICTS OF MISSOURI, *ss:*

And now comes the said plaintiff, and for a further replication to the plea of the defendant by him secondly above pleaded, the said plaintiff says, that he, the said plaintiff, by reason of anything in said plea mentioned, ought not to be barred or precluded from having or maintaining his aforesaid action thereof against said defendant, because he says that the President of the United States did issue his proclamation, bearing date the eighth day of December, eighteen hundred and sixty-three, whereby there was promised a full pardon, with restoration of all their rights of property, except as to slaves, to all those living in insurrectionary districts, except certain classes of persons therein mentioned, who should thereafter take and subscribe and keep thereafter inviolate a certain oath in said proclamation set forth and prescribed, and that prior to the commence-
49 ment of this suit, the said John K. Elgee, not being one of the persons excepted by the proclamation aforesaid, and then living in an insurrectionary district, did take and subscribe the oath required and prescribed by said proclamation to be taken, which was duly registered in accordance therewith, and did soon after, and long before the commencement of this suit, remove to and reside in the city of New Orleans, and so continue to reside there until his death, which New Orleans was not then, is not now, nor ever has been in any insurrectionary district or districts declared to be in rebellion by the President of the United States; and while thus residing in said New Orleans, and before the commencement of this suit, did again take and subscribe the oath aforesaid. so prescribed in the proclamation aforesaid, which oath was duly registered in accordance therewith; and said John K. Elgee did, from the time of taking the said oaths and each of them, thenceforth forever afterwards keep and maintain the said oaths inviolate. By means whereof all his rights of property in the goods, wares, and merchandise mentioned in said declaration, as well as all disabilities from having and maintaining his rights thereto, were, by the laws of the United States and by force of said proclamation, restored and removed; and this he is ready to verify. Wherefore he prays judgment, &c.

50 And the said plaintiff, for replication to the plea of said defendant by him fifthly above pleaded, says that the said plaintiff, by reason of anything in said plea mentioned, ought not to be barred or precluded from having or maintaining his aforesaid action thereof against said defendant, because he says that the property in the declaration mentioned was, prior to and at the time the same came into the possession of said Ralph S. Hart, as alleged in said

plea, the property of and belonged to the said John K. Elgee, and that the President of the United States did issue his proclamation, bearing date the eighth day of December, eighteen hundred and sixty-three, whereby there was promised a full pardon, with restoration of all their rights of property, except as to slaves, to all those living in insurrectionary districts, except certain classes of persons therein mentioned, who should thereafter take and subscribe and keep thereafter inviolate a certain oath in said proclamation set forth and prescribed, and that, prior to the commencement of this suit, the said John K. Elgee, not being one of the persons excepted by the proclamation aforesaid, and then being in an insurrectionary district, did take and subscribe the oath required and prescribed by said proclamation to be taken, which was duly registered in accordance therewith, and did soon after, and long before the commencement of this suit, remove to and reside in the city of New Orleans, and so continued to reside there until his death, which New Orleans was not then, is not now, nor ever has been in any insurrectionary dis-
51 trict or district declared to be in rebellion by the President of the United States; and while thus residing in said New Orleans, and before the commencement of this suit, did again take and subscribe the oath aforesaid, so prescribed in the proclamation aforesaid, which oath was duly registered in accordance therewith; and said John K. Elgee did, from the time of taking the said oath and each of them, thenceforth forever afterwards keep and maintain the said oath inviolate. By means whereof all his rights of property in the goods, wares, and merchandise mentioned in said declaration were, by the laws of the United States and by force of said proclamation, restored to him, and said property was so taken and held from said Elgee contrary to said proclamation and the laws of the United States; and this he is ready to verify. Wherefore he prays judgment, &c.

GLOVER & SHEPLEY, *Att'ys for Pl'ff.*

Which demurrer referred to above, is as follows:

Demurrer to amended replication to 2 plea.

In the circuit court of the United States for the districts of Missouri.

MILES SELLS, adm'r of John K. Elgee,
vs.
OLIVER LOVELL.

And the said defendant comes and says the second amended replication of the said plaintiff to the second plea of the defendant, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against defend-
52 ant, and that he, the said defendant, is not bound by law to answer the same; and for special cause of demurrer, defendant says that whereas plaintiff pleads a compliance with the provisions and conditions of the President's amnesty proclamation in bar of the

matters alleged in said second plea, yet the plaintiff hath not stated the facts relied upon as such compliance in such manner as to enable the court to determine as matter of law whether there was such a compliance on behalf of plaintiff as to constitute a good bar to said plea. And defendant further says that said amended replication is in other respects informal and insufficient; wherefore, defendant prays judgment, &c.

JAMES HUGHES,
CHARLES D. DRAKE, and
WM. N. GROVER,
Att'ys for Def't.

Demurrer to amended replication to 5 plea.

And the said defendant says that the amended replication of the said plaintiff to the said fifth plea of the said defendant, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and that he, the said defendant, is not bound by law to answer the same; wherefore, he prays judg't, &c.

JAMES HUGHES,
C. D. DRAKE,
53 WM. N. GROVER,
Att'ys for Def't.

And the said plaintiff joins in demurrer.

GLOVER & SHEPLEY, *Att'ys for Pl'ff.*

And afterwards, on the 18th day of October, A. D. 1865, the following further order was made, to wit:

JOHN K. ELGEE'S ADMINISTRATOR, plaintiff, *agst.* OLIVER LOVELL, defendant. } Removed from St. Louis circuit court.

This day come again the parties, by attorneys, and the court having examined the questions of law arising upon the demurrer filed by the defendant to the amended replication of plaintiff to the second and fifth pleas of said defendant in this case, and the joinder in said demurrer filed by plaintiff thereto, and being fully advised of and concerning the same, is of opinion that the law is for the plaintiff as to the questions of law arising upon said demurrer to the amended replication to the second plea herein; and, in accordance with such opinion, now order that said demurrer as to said amended replication to the said second plea be, and the same is hereby, overruled. And as to the questions of law arising upon said demurrer to the amended replication to the said fifth plea herein, is of opinion that the law is for the defendant, and, in accordance with such opinion, now orders that said demurrer as to said amended replication to said
54 fifth plea be, and the same is hereby, sustained, and said amended replication to said fifth plea adjudged insufficient. And afterwards, on the 20th day of October, A. D. 1865, the following further order was made, to wit:

Order filing joinder to the 2d replication to 2 plea.

JOHN K. ELGEE'S ADMINISTRATOR, plaintiff,
agst.
OLIVER LOVELL, defendant.
} Removed from St. Louis circuit court.

This day comes the defendant, by attorney, and files his rejoinder to the second replication of the plaintiff as amended, to the second plea of the defendant in this case, to which rejoinder the plaintiff files a similiter.

Which rejoinder referred to above is as follows :

Rejoinder to 2 replication to 2 plea.

In the circuit court of the United States for the districts of Missouri.

MILES SELLS, adm'r of John K. Elgee, deceased, pl'ff,
vs.
OLIVER LOVELL, def't.

And now comes the said defendant, and for rejoinder to the second replication of plaintiff as amended to the second plea of the defendant, says that he, the said plaintiff, by reason of anything in the said replication mentioned ought not to have and maintain his aforesaid action thereof against defendant, because, he says that the said plaintiff did not, before the commencement of this suit, remove to and reside in the city of New Orleans and so continued to reside
55 there until his death, nor was the said John K. Elgee, a resident of the city of New Orleans at the time of the commencement of this suit; and of this the said defendant puts himself upon the country.

DRAKE, HUGHES, and GROVER,
Att'ys for Def't.

And the plaintiff doth the like.

GLOVER & SHEPLEY, *Attor's for Pl'ff.*

And afterwards, on the 21st day of October, A. D. 1865, the following further order was made, to wit :

Judgment of the court upon the demurrer to the amended replication to 5 plea.

JOHN K. ELGEE'S ADMINISTRATOR, plaintiff,
agst.
OLIVER LOVELL, defendant.
} Removed from St. Louis circuit court.

This day come the parties, by attorneys, and the court having heretofore sustained the demurrer filed by the defendant to the amended replication of plaintiff to the fifth plea of defendant, and said plaintiff, by attorney, having failed further to reply to said fifth plea, and being now present in court, says he will abide the decision of the court upon

the questions of law arising upon said demurrer, thereupon the attorney for the defendant moved the court that final judgment be now entered in this case on said demurrer, which is allowed, and the judgment ordered to be so entered. Wherefore, it is now considered by the court that the plaintiff, Miles Sells, administrator of John K. Elgee, take nothing by this writ in this case, and that the defend-
56 ant, Oliver Lovell, go hence without day, and that said plaintiff pay the costs of this suit, and that execution or a fee bill issue according to the rules of this court for such costs.

And afterwards, on the 24th day of October, A. D. 1865, the following further order was made, to wit:

Order superseding judgment and ordering stay of execution, W. E. having been sued out.

JOHN K. ELGEE'S ADMINISTRATOR, plaintiff, *agst.* OLIVER LOVELL, defendant. } Removed from St. Louis circuit court.

This day comes again the plaintiff, by attorney, and on his motion it is ordered that the judgment rendered herein be superseded, and the execution heretofore ordered be stayed, a writ of error having been allowed by a judge of this court, and a bond executed according to law.

Bond of pl'ff upon suing out writ error.

Which bond referred to above, is as follows:

Know all men by these presents, that we, Edgar Ames, as principal, and John R. Shepley, as security, are held and firmly bound unto Oliver Lovell in the full and just sum of one thousand dollars, to be paid to the said Oliver Lovell, his heirs, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this twenty-
fourth day of October, in the year of our Lord one thousand
57 eight hundred and sixty-five. Whereas lately, at the October term, A. D. 1865, of the circuit court of the United States for the districts of Missouri, in a suit depending in said court between Miles Sells, administrator of John K. Elgee, against Oliver Lovell, judgment was rendered against the said Miles Sells, administrator as aforesaid; and the said Miles Sells, administrator as aforesaid, having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Oliver Lovell citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington, the first Monday of December next: Now the condition of the above obligation is such that if the said Miles Sells, administrator as aforesaid, shall prosecute said writ to effect, and answer all damages and costs if he fails to

make good his plea, then the above obligation to be void; else to remain in full force and virtue.

EDGAR AMES. [SEAL.]
JOHN R. SHEPLEY. [SEAL.]

Sealed and delivered in presence of—
BEN. F. HICKMAN, *Cl'k C. C. U. S., Mo. Dis's.*

Approved by— SAMUEL TREAT, *Judge.*

58 UNITED STATES OF AMERICA,
Circuit court for the districts of Missouri, ss:

I, Benjamin F. Hickman, clerk of the circuit court of the United States in and for the districts of Missouri, do hereby certify the foregoing fifty-seven pages to contain a full, true, and complete transcript of the record and proceedings had in said court, in case of Miles Sells, administrator of John K. Elgee, against Oliver Lovell, as fully as the same remain on file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said districts, this thirty-first day of October, in the year of our Lord eighteen hundred and sixty-five.

[SEAL.] BEN. F. HICKMAN, *Clerk of said Court.*

[5 ct. rev. stamp, cancelled.]

59 The United States of America to Oliver Lovell, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the districts of Missouri, wherein Miles Sells, administrator of John K. Elgee is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Treat, judge of the U. S. district court for the eastern dist. of Mo., and one of the judges of said circuit court, this twenty-fourth day of October, in the year of our Lord one thousand eight hundred and sixty-five.

SAMUEL TREAT.

Service of the within citation is acknowledged this 27th day of November, 1865.

OLIVER LOVELL,
By his attorney, C. D. DRAKE.

Filed December 2, 1865.

REC. 315—3

OPINIONS

OF

THE UNITED STATES COURTS

FOR THE

EASTERN DISTRICT OF MISSOURI AND FOR THE SOUTHERN DISTRICT OF ILLINOIS,

UPON

CASES DECIDED IN THOSE COURTS,

INVOLVING THE CONSTRUCTION OF

THE NON-INTERCOURSE AND CAPTURED PROPERTY ACTS,

AND THEIR RELATION TO

THE PRIZE ACTS.

WASHINGTON:
TREASURY DEPARTMENT.
1866.

OPINIONS

OF

THE UNITED STATES COURTS

FOR THE

EASTERN DISTRICT OF MISSOURI AND FOR THE SOUTHERN DISTRICT OF ILLINOIS,

UPON

CASES DECIDED IN THOSE COURTS,

INVOLVING THE CONSTRUCTION OF

THE NON-INTERCOURSE AND CAPTURED PROPERTY ACTS,

AND THEIR RELATION TO

THE PRIZE ACTS.

WASHINGTON:
1866.

REVENUE CASES.

UNITED STATES
vs.
269½ BALES OF COTTON,
WOLF AND OTHERS, CLAIMANTS. } Nos. 939 and 940.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FEBRUARY TERM, 1863.

HON. SAMUEL TREAT, JUDGE.

Captures of rebel property, whether on land or sea, are not prize of war *jure belli*.
Where acts of Congress authorize the capture and condemnation of such property, it is in virtue of the municipal law only, and not of the law of nations.
The jurisdiction of all such cases is on the instance side of the court.
Discussion of the relation of the law of nations and of the municipal law, respectively, in the constitutional government of the United States.

The questions raised by the exceptions now under consideration have been argued and will be treated together. They relate to and affect each of the libels, and cannot be well understood if discussed separately. They involve not only rules of pleading and practice, but grave propositions of public and constitutional law. The importance and intricacy of the questions demand more than an ordinary elaboration and analysis of the doctrines involved.

Some of the propositions have been so confused by a disregard of fundamental principles, and have been so long in dispute, both in Great Britain and the United States, and others are so entirely new to American jurisprudence, especially in the West, that it is difficult to present the views of the court clearly, within the ordinary limits of a judicial opinion. If the decision of every point presented in the argument was necessarily involved in the conclusions reached, it would be impossible to give the reasons on which those conclusions rest without an exhaustive discussion both of principles and of authorities. It must suffice, how-

ever, to condense, so far as practicable, what bears most directly upon the exceptions filed; leaving for further argument and decision such other questions, however important, as are not necessary to the present cases.

The first libel purports to be based on the confiscation acts of Congress, approved, respectively, August 6, 1861, and July 17, 1862; the second libel, on general prize law, *jure belli*, as supposed to be applicable on the western rivers to the existing insurrection. Whilst the first is on the *instance* side of the court in admiralty, and refers in terms to the two acts named; the second refers to no act of Congress, but avers, in one article, a military capture *on land by land forces*—"as prize of war," and that therefore the "*res* is forfeited and confiscated to the United States,' and in the second article to a coöperation in said capture by the officers and crew of certain *transport* vessels mentioned.

It is contended, that whilst the first suit, being directly based on the acts of August 6, 1861, and of July 17, 1862, necessarily involves their interpretation; the second rests, not alone upon the general principles of prize law *jure belli*, but also upon those two statutes, inasmuch as said statutes relate to the subject-matter of "captures," "prize," and "seizures" of rebel property.

Without following the order in which the points were presented, it may be well to first settle the leading *principles* upon which this decision must be made.

By the Constitution of the United States, the judicial power extends to "all cases of admiralty and maritime jurisdiction," to "all cases in law and equity arising under this Constitution, the laws of the United States," &c., and "to controversies to which the United States shall be a party." By the judiciary act, (September 24, 1789,) section nine, the district courts "have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts, as well as upon the high seas; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred under the laws of the United States." The act of August 6, 1861, after enumerating certain descriptions of property, proceeds as follows: "All such property is hereby declared to be lawful subject of prize and capture wherever found; and it shall be the duty of the President of the United States to cause the same to be seized, confiscated, and condemned."

"Such prizes and captures shall be condemned in the district or circuit court of the United States having jurisdiction of the amount, or in admi-

ralty in any district in which the same may be seized, or into which *they* may be taken and proceedings first instituted."

The act of May 20, 1862, directs that "the proceedings for the penalties and forfeitures accruing under this act may be pursued" as in the act to which it is supplementary, viz., the act of July 13, 1861; which act says, "the proceedings on seizures and forfeitures under this act may be pursued in the courts of the United States in any district into which the property so seized may be taken and proceedings instituted, and such courts shall have and entertain as full jurisdiction over the same as if the seizure was made in that district."

The act of March 25, 1862, after making several provisions with respect to the modes of proceeding in prize cases, says: "The provisions of this act shall apply as well to cases now pending as to *all future cases of maritime captures*, and to captures and seizures made under the laws for the abolition of the slave trade." This act prescribes also certain duties for prize commissioners "whenever any property *captured* as *prize* shall be brought into any district of the United States for adjudication," also for the marshal, &c. [The provisions of this act, so far as they relate to the custody of proceeds of sales, are in conflict with the provisions of the act of July 17, 1862, "for the better government of the Navy of the United States," section twelve; and the last-named act is in conflict with the joint resolution of the same date. Both purport to relate to prize cases, *as such*, so far as custody of funds is concerned. And the act of March 25, on the same subject, seems to bring within its purview all *maritime* captures.] The act of July 17, 1862, "to suppress insurrection," &c., provides "that to secure the condemnation and sale of any such property, after the same shall have been seized, so that it may be made available for the purpose aforesaid, proceedings *in rem* shall be instituted in the name of the United States in any district court thereof," &c., "within which the property above described, or any part thereof, may be found, or into which the same, if movable, may first be brought; which proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases," &c., to be "condemned as enemies' property."

It is unnecessary to quote from other acts in order to present fully the points to be determined.

The judiciary act gives jurisdiction of "all *seizures* on land" as well as water, and "of all suits for penalties and forfeitures" incurred under United States laws. The act of August 6, 1861, without defining the jurisdiction specially, declares the property named in it "lawful subject of prize and capture *wherever found*," to be proceeded against either in the United States circuit or district courts, according to their respective jurisdictions as previously established. There can be no doubt that the property embraced in that act covers all such as may be acquired, used,

&c., on *land* as well as water; that its provisions were designed to embrace both land and maritime captures of such guilty property.

But it is urged that the jurisdiction conferred by the Constitution of the United States on the United States judiciary does not extend to *land captures*, and that, if it does, it is not by virtue of the clause granting cognizance of "all cases of admiralty and maritime jurisdiction;" that the clause in question has a distinct meaning, and cannot be so enlarged by any declaration of Congress that cases not within its purview at the time of the adoption of the Constitution can be hereafter treated as if embraced within it. The doctrine thus invoked is too well settled for dispute. Were it otherwise, the Constitution would be as vague, uncertain, intangible, and evanescent as is the British under the theory of Parliamentary omnipotence. If Congress can declare a case to be within admiralty and maritime jurisdiction which is not constitutionally so, and thereby, despite the plain intent of the Constitution, extend the limits of federal or judicial power, it is virtually as omnipotent as the British Parliament. It can alter, amend, or abolish the United States Constitution by a simple declaratory act, as to any provision thereof which it may choose to thus change or destroy.

But such an act would have no such effect; it would be simply void—a mere nullity. No one contends for a different doctrine.

What, then, was the *prize* jurisdiction of admiralty courts at the time the United States Constitution was adopted? This is a very difficult question. After as full an examination of all accessible authority as possible, the subject is not freed from embarrassment. It appears that, in England, the *common law courts* had no jurisdiction of hostile captures, as such, on land or water. Lord Mansfield, in *Lindo* vs. *Rodney*, (*Douglas*, 591, in a note,) gives his views at great length on that point, after an elaborate examination of British authorities. He says: "The court of admiralty is called the instance court—the other the prize court;" that is, the court created in each war by the King's commission "to hear and determine, according to the course of admiralty and the law of nations," "upon all, and all manner of captures, seizures, prizes, and reprisals, of all ships and goods that are or shall be taken."

"The manner of proceeding is totally different. The whole system of litigation and jurisprudence in the prize court is peculiar to itself; it is no more like the court of admiralty than it is to any court in Westminster Hall. From 8th Elizabeth, chap. 5, it appears that in *civil and marine causes* there were many appeals, which the statute restrains to one to the King in chancery, to be finally decided by delegates. But prize is not a civil and marine cause, and the appeal lies to commissioners, consisting of the Privy Council.

A thing being done on the high seas does not exclude the jurisdiction

of courts of common law. For seizing, stopping, or taking a ship upon the high seas not *as prize*, an action will lie; but for taking such *as prize*, no action will lie. The nature of the question excludes, not the locality."

The restrictive statutes of *Richard and Henry*, and subsequent prohibitions, he insisted, had reference to the *instance* courts alone, not to *prize* courts.

"The nature of the ground of action, prize or no prize, not only authorizes the prize court but excludes the common law." Instance courts were confined by the locality, to the high seas, *extra corpus comitatus;* but prize tribunals extended over hostile captures in British as well as foreign ports, harbors, and havens. Naval expeditions, he says, are with a view to operations on land as well as sea, if occasion offers. "It is not by accident, therefore, that the words of the commission are general; all manner of captures, seizures, prizes, and reprisals of all ships and goods—it don't say upon the sea—it don't say goods in the ship—reprisals is the most general word that could be used." "In causes *civil and marine*, to give jurisdiction to the court of admiralty, the libel must allege the cause of suit to be done on the high seas."

After mentioning the mischievous consequences to flow from any other doctrine, he adds: "By the law of nations and treaties, every nation is answerable to the other for all injuries done, by sea or land, or in fresh waters, or in port. Mutual convenience, eternal principles of justice, the wisest regulations of policy, and the consent of nations, have established a system of procedure, a code of law, and a court, for the trial of prize. Every country sues in these courts of the others, which are all governed by one and the same law, equally known to each. The claimant is not obliged to sue the captors for damages, and undergo all the delay and vexation to which he may think himself liable if he sues by a form of litigation of which he is totally ignorant, and subjects his authority to the rules and authority of a municipal law by which he is not bound. In short, every reason which created a prize court as to things taken upon the high seas, holds equally when they are thus taken on land. * * * The question, '*prize or no prize*,' is the boundary line; and not the locality of land or sea, or port within the body of a country of the realm."

It may well be remarked here that the general reasoning of Lord Mansfield, as to the importance and propriety of similar rules for captures both on land and water, has been urged by publicists and diplomatists quite frequently; yet the broad distinction between captures on land and sea, continues unchanged to the present day. The historic, and other causes leading to such a distinction are easily traceable. Maritime jurisdiction owes its form, if not its origin, chiefly to the celebrated sea ordinances adopted by maritime powers and cities, in the interests of commercial intercourse. The high seas, *which are common* to all nations, required an international

code for the benefit of all, *a common* law for the seas; and during wars between different maritime powers, the rights of neutrals to use the common highway, despite controversies or hostilities to which they were not parties, necessarily led to some acknowledged mode of adjudication. Hence the laws of maritime prize and prize courts, from which, in modern times, most of the important rules of international law are learned.

Notwithstanding the positive statements of Lord Mansfield, in the foregoing opinion and his collection of cases, yet he reaches this conclusion: "As to plunder, or booty, in a mere continental land war, without the presence or intervention of any ships, or their crews, it has never been important enough to give rise to any question about it. It is often given to the soldiers on the spot, or wrongfully taken by them contrary to military discipline. If there is any dispute, it is regulated by the commander-in-chief. *There is no instance, in history or law, ancient or modern, of any question before any legal judicature ever having existed about it in this kingdom.* To contend that such plunder was within the rules and jurisdiction of the prize court, might be opposed by the subject-matter, the nature of the jurisdiction, the person to whom it is given, and the rules by which he is to judge. Therefore, the counsel have confined their argument to reprisals ashore by a *naval* force; at least, I shall consider it so confined, *without entering into any question about booty in a mere land war, as to which I have no light to go by, and it is not now necessary to be decided; neque teneo, neque dicta refello.*"

Thus it is clear, that the point presented here he expressly refrained from deciding. He said he had no light to go by; that in England there was no instance in history or law, of any such adjudication. If, after his diligent researches, he was forced to such an admission, we might well despair of finding English authority on the question.

Mr. Justice Buller, in *Le Caux* vs. *Eden*, (*Douglas*, 588,) states that "the authorities are the other way, and so, also, is the principle—[viz: that common-law courts have prize jurisdiction]—for the principle is, that the question, "prize or no prize," and the consequences of it are conusable solely in the admiralty court; the true reason of which is, that prizes are acquisitions *jure belli*, and the *jus belli* is to be determined by the law of nations, and not by the particular municipal law of any country."

It must be remembered that Lord Mansfield was passing upon an application to Westminster Hall for a prohibition on the admiralty court to prevent its proceeding in certain prize cases resulting from the captures at St. Eustatius. He held that the common-law courts had no jurisdiction, and therefore refused the writ.

We find references, in documents of that period, to Rodney's expedition, which justify the remarks of counsel in 1 *Bay*, 22, viz: "The case of Sir George Rodney (*Doug.*, 592) at St. Eustatius, where the principal

part of the captures was made on *land*, was next relied on. He was an admiral, entrusted with the command of a fleet, when he took that island; and General Vaughan, who was with him, commanded the land forces; and although they took upon them to fleece the unfortunate Jews of all the money and valuable effects they had, as well as others who traded on that island, and gave orders for the sale of the whole of their property, yet all Europe was exasperated at this conduct. It was considered a most wanton abuse of power, a violation of the laws of nations, and nothing less than downright robbery and plunder. The court of admiralty in England was impressed with the same idea; for it gave no sanction to so unwarrantable a proceeding; and restitution was decreed, as far as it was possible to identify the property of the sufferers."

It appears that the captures were made by a *conjoint* naval and land expedition, and that the admiralty court thus obtained jurisdiction, as in other cases of joint capture. The extent to which naval forces were permitted by Great Britain to make land descents has been often passed upon. The doctrine is distinctly laid down, that *private* property on land cannot be taken by naval or privateering expeditions under English laws or commissions. That is a right which the sovereign reserves to himself; and the captors get nothing. This rule is established to prevent the plundering of private persons on coasts, and all marauding expeditions.

Hence the learned discussions concerning the language of "commissions" issued to naval commanders and privateers, and the efforts sometimes made to deduce the right from the words "on sea and land," as used therein, have resulted merely in settling the rule more firmly, viz., that such expeditions are always confined to forts, &c., on the *sea coast*, and to the *public* property taken at *such* places on land—to those operations on land which belong appropriately to *naval* warfare, such as the reduction of coast and harbor defences, and expeditions in the immediate neighborhood upon which such defences may depend for support, save only those special instances in remote parts of the world to which Lord Stowell has guardedly alluded.—2 *Wildman*, 314; *The Thorshaven*, *Edw. Ad.*, 102–13; *Chinsurah*, 1 *Acton*, 179; *The Two Friends*, 1 *Rob.*, 271, 284; *The Stella del Norte*, 5 *Rob.*, 349; *The Dordrecht*, 2 *Rob.*, 55; *The Rebeccah*, 1 *Rob.*, 227; 3 *Phill.*, 499; *The Genoa*, 4 *Rob.*, 388; *The Joseph*, 1 *Gall.*, 545, and 8 *Cranch*, 456; *The Rapid*, 1 *Gall.* 295; 8 *Cranch*, 155; and 3 *Phillimore*, 194. Contra.—*Jenkins* vs. *Putnam*, 1 *Bay.*, 8; *Brown* vs. *United States*, 8 *Cranch*, 110.

Lord Tenterden, after pronouncing "the proper character of a transaction on land to have been that of hostile seizure, made, if not *flagrante bello*, yet *nondum cessante bello*," decided that consequently "the municipal common-law courts had no jurisdiction to adjudge upon the subject," (*Elphinstone* vs. *Bedreechund*, 1 *Knapp, P. C. Rep.*, 360.) It may be considered the

well-settled doctrine in all British courts, that the common-law courts of that country, as such, have no jurisdiction over hostile captures, or captures *jure belli*. It has been said that the absence of prize cases on land in English courts arises from the insular position of that country, (*The Recovery*, 6 *Rob.*, 341;) but may not the fact be also due to the distinction heretofore alluded to, viz: that in land captures rights of neutrals are seldom affected? When a belligerent force enters the country of an adverse belligerent, it exercises an admitted right of belligerency, but it cannot invade *neutral* territory. On the high seas a belligerent has rights only in common with neutral nations, and must so act as to not injure neutrals. Captures on land have generally been confined to *public* property, and been retained by the sovereign. In some instances he has given captors an interest therein, or made a grant to them of a portion of its estimated value. That is not, however, the common rule.—3 *Phillimore*, 189; *Alexander* vs. *Duke of Wellington*, 2 *Russ. & Mylne*, 35; *French Guiana*, 2 *Dods.*, 151; *The Genoa*, 2 *Dods.*, 446.

As captures of all kinds belong to the sovereign, "*parta cedunt reipublicæ*," there can be no interest therein for the captors except by grant. The paucity of such grants in land captures, and, where they exist, the commutation therefor in money, will account for the absence of decisions. Justice Buller gives the true reason for the absence of municipal jurisdiction—*all such cases are determined by the law of nations, and not by municipal codes.* In England, the sovereign, at the commencement of each war, issues a commission of prize, and also may prescribe the mode of passing upon land captures. Jurisdiction in maritime captures denominated *prize*, and in land captures called *booty*, is granted to different tribunals in England, as will be seen more fully hereafter.—3 *Phillimore*, 189, *et seq.*; *The Joseph*, 1 *Gall.*, 545; *Wh. El.*, 405; *Cook* vs. *Howard*, 13 *Johns.*, 376; *Slocum* vs. *Wheeler*, 1 *Conn.*, 446; *The Rebeccah*, 1 *Rob.*, 227, 230, 286; *The Genoa*, 2 *Dods.*, 446; *United States* vs. *Betsey and Charlotte*, 4 *Cranch*, 452.

In confirmation of the remark of Justice Buller, we have many express decisions. Prize courts are not municipal tribunals governed in their procedure and rules of decision by municipal regulations, but by the laws of nations. In the case of "The Recovery," (6 *Rob., Adm. Rep.*, 348,) Lord Stowell said: "It is to be recollected that this is a court of the *law* of nations, though sitting here under the authority of the King of Great Britain. It belongs to other nations as well as our own; and what foreigners have a right to demand from it is, the administration of the law of nations simply, and exclusively of the introduction of principles borrowed from our own municipal jurisprudence."

In "The Fox," (*Edw. Adm.*, 312:) "In the course of the discussion a question has been started, What would be the duty of the court under

orders in council that were repugnant to the law of nations? * * * I observe that this court is bound to administer the law of nations to the subjects of other countries in the different relations in which they may be placed towards this country and its government. * * * This is its unwritten law, evidenced in the course of its decisions, and collected from the common usage of civilized States."

Sir James Mackintosh decided that in case "illegal instructions"—that is, instructions against the laws of nations—were issued by his sovereign, "it would be the duty of a judge to disregard them, and to consult only that universal law to which all civilized States and princes acknowledge themselves to be subject, and over which none of them can obtain any authority."

The judicial committee of the Privy Council held the same doctrine in 1855. (*The Otsee;* see, also, American cases, cited hereafter, upon the war powers of the United States government, and especially "*The Charming Betsey,*" 2 *Cranch*, 64.) Nor is rigid adherence to that rule, in theory at least, insisted upon only by British prize courts. It springs necessarily from the fundamental ethics of public law and the relations of independent States with each other. In the family of civilized nations all are equal, bound together by a common law, and entitled to the same respect and privileges. That public society is thus described by Seneca:

"*Membra sumus corporis magni, natura nos cognatos, edidit, quum ex iisdem et in eadem gigneret. Haec nobis amorem dedit mutuum, et sociabiles fecit.*"

A sentiment concerning the social state remarkable for its similarity of expression to that of St. Paul, who was nearly a contemporary:

"All the members of that one body, being many, are one body; and whether one member suffer, all suffer with it * * that there should be no schism in the body, but that the members should have the same care one for another."

From the society of nations springs the necessity of that universal law, to be recognized by international tribunals as always controlling; which Cicero has thus described:

"*Neque erit alia lex Romæ, alia Athenis, alia nunc, alia posthac; sed et omnes gentes et omni tempore, una lex, et sempiterna et immutabilis continebit, unusque erit communis quasi magister et imperator omnium Deus. Ut jam universus hic mundus una civitas est, communis Deorum et hominum existimanda.*"—*S. C. Wheaton's Hist.*, 171; 1 *Duer*, 445; 1 *Gall.*, 575; 1 *Rob.*, 284; 4 *Cranch*, 241, 293; 9 *Cranch*, 284; 3 *Dall.*, 16; 1 *Pet.*, 542; 13 *Howard*, 498; 18 *Howard*, 112; 2 *Cranch*, 64.

If, then, prize courts, however constituted, are courts of international and not of municipal jurisdiction; and if they have sprung into existence partly, if not chiefly, with reference to the rights of neutrals upon a common highway; and if they have been confined to matters of *prize*, as con-

tradistinguished from *booty*, it is important to consider more accurately the line of distinction between the two classes of cases, in order to ascertain whether admiralty and maritime courts, as such, had any jurisdiction of land captures by land forces, or of land captures by naval forces beyond the coast, except as before mentioned. In the case of "The Genoa" (2 *Dods.*, 446) it was held that "prize means maritime captures only—ships and cargoes taken by ships. A land force has no interest in *prize property so called.* What a land force takes by itself is not *prize*, but *booty.* Under the British prize acts it relates to captures made by ships only; if land force is employed, its title is not recognized." This rule is quoted and recognized in 1 *Hagg.*, 32. See also 2 *Wildman*, 314; "The Thorshaven," *Edw. Adm.*, 102; "The Rebeccah," 1 *Rob.*, 127, 230, (*Note,*) 286.

In 3 *Phill.*, 185, 191, (side,) the modes of proceeding in *booty* cases is given; and an accurate examination of the authorities referred to fully supports the text. At the time the American Constitution was adopted, neither admiralty courts in Great Britain nor the municipal courts of that country had jurisdiction of *booty.* Subsequent British statutes have enabled the admiralty courts to take such jurisdiction. Prior thereto, the only cases that arose were *quasi* maritime captures, where *naval* descents were made on fortified places or towns on the coast.

Martens (288–9) speaks of *booty* as "movable property taken from the the vanquished *soldiers.*" Vattel (364) says "towns and lands are conquests; movable property taken from the enemy is called *booty;*" and he restricts booty, to "*the spoils of the battle-field and of camps and towns carried by storm or assault.*" In *Wheaton's Elements of International Law*, (*p.* 395,) it is stated that "private property on land is also exempt from confiscation, with the exception of such as may become booty in special cases, when taken from enemies in the field, or in besieged towns, and of military contributions levied upon the inhabitants of hostile territory. This exemption extends even to the case of an absolute and unqualified conquest of the enemies' country."

The bucanneering expeditions in the time of Queen Elizabeth, and the gross violations of the rules of civilized warfare which have frequently occurred since, cannot be justly relied upon in opposition to modern publicists.

Those outrages have been sometimes the subject of apology or attempted excuse, on the ground of necessary retaliation. Diplomatic history is full of such cases. The United States have always been foremost in denouncing such action. During the war of 1812, the American Secretary of State disavowed, in the name of the government, all such outrages when perpetrated by our forces in Canada or elsewhere.

He declared that the "government owed it to itself and to the princi-

ples it had ever held sacred, to disavow, as justly chargeable to it, any such wanton, cruel, and unjustifiable warfare. Whatever unauthorized irregularities might have been committed by any of its troops, it would have been ready, acting on the principles of sacred and eternal obligation, to disavow, and, as far as might be practicable, to repair."—(*Wh. Elements*, 399.) And, in reply, it was stated in behalf of the British government "that it was as little congenial to the disposition of the British government as it was to that of the United States, deliberately to adopt any plan of hostilities which had for its object the devastation of private property."—*Wh. El.*, 400.

The burning of the city of Washington has been considered a gross violation of the laws of war; and so were the outrages perpetrated in the peninsula under British commanders, and the plunder of Italian and other cities by Napoleon. The principle was recognized in the treaty at Ghent, by which both the United States and Great Britain stipulated to restore all private property taken during the war. The elaborate discussion which followed that treaty, especially the able dispatches by the American Minister and Secretary of State, so fully vindicate the doctrine laid down by Wheaton as to justify Mr. Marcy in assuming, in his elaborate dispatch to the Minister of France on privateering, (in response to the proposition of the Five Powers,) that private property on land is no longer considered lawful subject of capture. True, the case of Brown *vs.* The United States (8 *Cranch*, 110) seems to decide that all enemy property within the *territorial* jurisdiction of a belligerent may be confiscated as prize of war, and that all such property, whenever captured, is lawful prize. In Ware *vs.* Hylton, (3 *Dall.*, 199,) the most extended right was asserted. It is not necessary to analyze the former case to ascertain the points really decided—whether it is to be treated as going further than this: even if enemy property within the territorial jurisdiction of a belligerent were confiscable as prize, yet, until Congress passes an act for the enforcement of that extreme right, it is not to be captured and condemned. Nor is it proper at this stage of the discussion to go into an inquiry as to the effect later decisions upon the rights of *conquest* must have in modifying those extreme opinions.

It may suffice to intimate here, that the views expressed by the United States Supreme Court in several subsequent cases seem to be wholly irreconcilable with such extreme doctrine. Our diplomatic history is based on an entirely different theory. In 7 *Peters' Rep.*, 86, Chief Justice Marshall thus states the law of conquest: "The modern usage of nations which has become law would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would

be outraged, if private property should be generally confiscated and private rights annulled."

No little light may be had on this subject from an examination of the following authorities: 1 *Peters*, 542; 3 *Peters*, 122; 4 *Peters*, 511; 7 *Wheaton*, 104; 10 *Peters*, 720–9; 9 *Peters*, 137, 147, 733; 9 *How.*, 603; 16 *How.*, 164. Also, 3 *Cal. Rep.*, 445; 8 *Ib.*, 165; 15 *Ib.*, 559; 16 *Ib.*, 220; 3 *Phill.*, 118.

Wheaton, in his Elements of International Law (*p.* 344 *et seq.*) reviews the doctrine, and states: "There is a great diversity of opinions upon this subject among institutional writers, and the tendency of modern usage between nations seems to be to exempt such property from the operations of war. * * * It appears, then, to be the modern rule of international usage, that property of the enemy found within the territory of a belligerent State, or debts due to his subjects by the government or individuals at the commencement of hostilities, are not liable to be seized and confiscated as prize of war." Such is the conclusion of that eminent publicist, whilst he admits that the rigid abstract rule as asserted in the case of Brown *vs.* The United States must still be considered a belligerent right.

On the same point Chancellor Kent holds (1 *Kent's Com.*, 91) that "there is a marked difference in the rights of war carried on by land and at sea." After stating that the capture or destruction of private enemy property is allowed in maritime war by the law and practice of nations, he proceeds thus: "But there are great limitations imposed upon the operations of war by land, though depredations upon private property, and despoiling and plundering the enemy's territory, are still too prevalent, especially when the war is assisted by irregulars. Such conduct has been condemned in all ages by the wise and virtuous, and it is usually punished by those commanders of disciplined troops who have studied war as a science, and are animated by a sense of duty or the love of fame." He cites ancient and modern examples on the subject, and closes his review of them with these just observations: "The general usage now is, not to touch private property upon land without making compensation, unless in special cases dictated by the necessary operations of war, or when captured in places carried by storm, and which repelled all the overtures for a capitulation. Contributions are sometimes levied upon a conquered country in lieu of confiscation of property, and as some indemnity for the expenses of maintaining order and affording protection. If a conqueror goes beyond these limits wantonly, or when it is not clearly indispensable to the just purposes of war, and seizes private property of pacific persons for the sake of gain, and destroys private dwellings, or public edifices devoted to civil purposes only, or makes war upon monuments of art and models of taste, he violates the modern usages of war,

and is sure to meet with indignant resentment and to be held up to the general scorn and detestation of the world."

Commenting upon the rule, as stated in Brown *vs.* The United States, he styles it "the ancient and sterner rule;" and says that "though this decision established the right contrary to much of modern authority and practice, yet a great point was gained over the rigor and violence of the ancient doctrine, by making the exercise of the right depend upon a special act of Congress;" that the doctrine of that case is "against the weight of modern authority." On the same question, see *Martens, pp.* 288 *et seq.; Vattel*, 364; *Polson*, 38 *et seq.; Wildman*, 9; *Wheaton's Elements*, 344, 395. Also, treaties between the United States and Great Britain of 1783 and 1814; between Great Britain and France in 1786; of Amiens and of Paris, March 30, 1814; and the following cases on the latter treaties, with reference to British property under French confiscation acts:

Pilkingston's case, 2 Knapp's Privy Council Rep., 7.
Solvin's case, 2 Knapp's Privy Council Rep., 350.
Bordien's case, 2 Knapp's Privy Council Rep., 353.
Genesis' case, 2 Knapp's Privy Council Rep., 345.
De Tastil's case, 2 Knapp's Privy Council Rep., 358.
Johnston's case, 2 Knapp's Privy Council Rep., 336.

From these cases and treaties, it is apparent with what little favor either the confiscation or sequestration of private enemy property within the country is received; and also that an act of confiscation, without seizure or actual sequestration, is considered as not passing title, &c.

The doctrine of the confiscability of private enemy property on land was seriously disputed in the Continental Congress, and during the American Revolution.—*Madison's Papers, pp.* 91, 105, 136, 144, 148, 235, 239, 490, 575. Also, *Ib. pp.* 735, 854, 866, 735, 740, 1226, 1232, 1347, 1550, 1612.

It is to be observed that *Wheaton* and *Kent* use very guarded language; they speak of modern usage and the weight of authority; but if the laws of nations, which all prize courts are bound to observe, are "the usage among civilized nations" and the *universal* rule, as described by Cicero and Lord Stowell, then it might be worthy of serious inquiry, what prize courts in the United States are bound to hold in such cases. It is not necessary, however, in the cases now before the court, to enter upon so serious and important a discussion. It is but just, nevertheless, to remark that the decisions of the United States Supreme Court, when thoroughly analyzed, will not, probably, be found in conflict with the weight of authority or modern usage. It is unfortunate, oftentimes, that what is said *arguendo*, is taken for a point decided, and that the reasoning of the judge who pronounces the decision is supposed, necessarily, to meet, in all its *dicta* or argumentation, with the solemn sanction of the court whose decision he

states. If the laws of permanent conquest, as frequently held by that court, do not *per se* divest private titles or disturb municipal rules and laws, then why is it, that a partial, temporary, and uncertain conquest, depending solely upon doubtful possession, gives greater rights and powers over private interests than full, permanent, and absolute dominion? The distinction is not to be overlooked, however, between the right of detention and of sequestration, *flagrante bello*, and the rights of permanent dominion. The necessary military operations may, at the moment, demand and justify many acts which, under other circumstances, would be wholly unjustifiable and worthy of universal detestation.

In thus presenting at more length than was at first intended the distinctions between *prize* and *booty*, the rules of war concerning captures on land and on water, and the principles by which prize, instance, and municipal courts are to be respectively governed, the necessity of much repetition has been avoided. It is essential to a right decision in these cases, that the true limits between those jurisdictions should be ascertained.

If a prize court is, in its very constitution, an international tribunal, controlled by the laws of nations, and not by municipal law, then the question must be met, whether a violation of a municipal statute can be pursued in a prize court, as *prize of war*, instead of a forfeiture, by force of the statute. It sometimes may be, that the municipal statute directs the proceedings for such forfeitures to be the same as in prize cases, *jure belli;* and then the modes of procedure, *quoad hoc*, must obey the statutory regulations. Still the court will not be a prize or international court, nor act as such in hearing such cases; but merely an instance or municipal court. The modes of pleading and practice in the two courts are very different, and must never be confounded. In the prize court, the essential allegation is "prize or no prize;" and the practice is to take proofs, in the first instance, solely *in preparatorio*, according to well-known rules therefor. No evidence is to be heard in contradiction thereof, (8 *Cr.*, 384; 2 *Gall.*, 249; 3 *Phill.*, 392, 416. In instance courts, the allegations must bring before the court the substantive facts on which the demand is based; and if the proceeding is for a forfeiture in consequence of a violation of a statute, (whether that statute be of non-importation, non-intercourse, embargo, or ordinary revenue regulations,) the allegations must bring the case within the statute. It is obvious that foreign nations, whether neutral or belligerent, have no right to interfere between a sovereign and his subjects in the administration of his municipal authority within his own exclusive jurisdiction; and, therefore, international law is not to govern. It is true, instance courts, in the administration of pure maritime law, adjudicate according to the recognized laws of nations, or general maritime rules, if the transaction undergoing investigation

occurred upon the high seas, or extra-territorially. Still, as Lords Mansfield and Stowell justly held, prize and instance courts are entirely distinct, as much so as courts of prize and of common law. Their proceedings cannot properly be confounded, and prize allegations be intermingled or joined with those belonging to the instance tribunals; because, first, the tribunals to adjudicate them are different; secondly, the modes of taking proofs are different; thirdly, the rules governing the proceedings, as to evidence and preparation for hearing, are unlike; and lastly, the codes of jurisprudence to be administered are separate and distinct.

The conclusion reached from the foregoing authorities is, that *admiralty* courts have no jurisdiction of land captures, *jure belli*, by land forces only; nor of land captures by the conjunct operations of land and naval forces, or by naval forces alone, except within the limits already named. Modern British statutes, under which *booty* cases may be referred to British admiralty courts, do not alter or enlarge the jurisdiction of American "prize" courts in admiralty.

Justice Story (1 *Gall.*, 375—"*The Emulous*") says: "However the question may be as to the right of admiralty to take cognizance of mere captures made on land exclusively by land forces, as to which I give no opinion, it is very clear that its jurisdiction is not confined to mere captures *at sea*." He then states the limitations as to naval captures alone, and as to joint captures, just as before settled by Lord Stowell and others, and adds: "For the determination, therefore, of the case before the court, it is not necessary to claim a more ample jurisdiction; for the capture or seizure, though made in port, was made while the property was water-borne. Had it been landed and remained on land, it would have deserved consideration, whether it could have been proceeded against as prize under the admiralty jurisdiction, or whether, if liable to seizure and condemnation in our courts, the remedy ought not to have been pursued by a process applicable to municipal confiscations. On these points I give no opinion."

It may be that sometimes a British or American statute (like that of August 6, 1861) declares certain property "lawful prize;" but, as no municipal statute can change the laws of nations, proceedings for such confiscations or forfeitures cannot be brought in a court administering only the laws of nations—or a prize court proper—but must be instituted in an instance or municipal court. This has been the uniform rule. Indeed, it is impossible, from principle, that it should be otherwise. In the case of "The Recovery," (6 *Rob. Adm. Rep.*, 344,) where an American vessel had been brought *as a prize* into England for a violation of the British colonial and navigation acts, Sir William Scott, sitting in a prize court, asked "by what authority it could be shown to be competent to the prize court of admiralty to proceed to confiscation of a foreign ship and

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cargo for a breach of revenue?" The answer given by the proctor was, that the acts of Parliament "directed ships and cargoes so offending, taken at sea, to be brought in *as prize*, and empowered the court of admiralty to proceed upon them, which implied it to be an offence properly amenable to the jurisdiction of this court." In pronouncing the opinion of the court, that master of this department of jurisprudence thus decided: "There is a preliminary question, whether the case is properly brought before the court in its present form, that is, as a prize case. The court of admiralty is a court of revenue in one of its branches. * * * But I am now sitting in a court of prize, and the prayer that is addressed to that court is, that it would inflict the penalties of the revenue court on a foreign ship and cargo that is brought before it as a seizure of war. I should have been glad to have heard under what authority the court of admiralty could mingle its jurisdiction in this manner. As to the authority of precedents, I will take upon myself to say that *there are none*." He then discussed the broad distinction between rejecting the claim, in prize courts, of a British subject when his demand could be maintained only by showing a violation of a British statute, and of applying the same doctrine to a foreigner who was not amenable to that municipal law. His conclusion established the inflexible rule, before quoted, viz: "This [the prize side of the court] is a court of the law of nations. * * * And what foreigners have a right to demand is, the administration of the law of nations simply, and exclusively of principles borrowed from our own municipal jurisprudence. * * * In the case of a British subject it is different. To him it is a British tribunal, as well as a court of the law of nations; and if he has been trampling on the known laws of his country, it is no injustice to say that a person coming into any of the courts of his own country, to which he is naturally amenable, on such a transaction, can receive no protection from them. * * * On these grounds, therefore, I shall pronounce that neither directly nor indirectly is it a question which I am at liberty to entertain in a prize court; not pronouncing on the question of law, [the meaning and application of the British statutes,] but declining to enter into that discussion for want of competent jurisdiction." And, therefore, he ordered restitution.

The position of a claimant in a prize court who has violated the municipal laws of his country, as for instance its prohibitory statutes, especially in the particular transaction under adjudication, has been treated in the same way by all American prize courts. The reason of such a rule may be briefly given: He is an *actor* and must make out his claim. If in his effort to establish it he shows that his title or interest is forfeited to the government for a breach of its laws, he thereby proves he has no interest in the *res* entitling him to be a claimant at all; and, fur-

ther, he calls upon the court to aid him in consummating a fraud upon the law; he appears with unclean hands, and seeks to make the court the instrument of defeating the laws it is bound to enforce.

United States *vs.* Steamboat Champion was a case in which that point was decided by this court in December, 1861, and the principles as well as authorities fully commented upon. (See *Wheaton on Capt.*, 225; *The Gran Para*, 7 *Wheaton*, 483; *The Bello Corunnes*, 6 *Wheaton*, 169; 8 *Wheaton*, 147; 8 *Cranch*, 276, 382, 398; 12 *Wheaton*, 1, 486; 1 *Pet.*, 547; 1 *Gall.*, 513; 2 *Rob.*, 77.

In a trade prohibited by statute, mistake or absence of bad faith does not protect. *Ita lex scripta est;* and, the prohibition being absolute, all trade forbidden is illicit. (1 *Duer*, 523–7; 4 *Rob.*, 118, 121; 5 *Rob.*, 283; 2 *Rob.*, 25; 2 *Wildman*, 48; 1 *Rob.*, 14, 17, 22, 102; 3 *Rob.*, 41; 4 *Wheat.*, 107; 2 *Gall.*, 268; 7 *Pet.*, 586; 1 *Gall.*, 545; 8 *Cranch*, 451; *Marriott's Decisions*, 76.) And in foreign war, all commercial intercourse is inhibited by the laws of war. (*The Rapid*, 8 *Cranch*, 155; *S. C.*, 8 *Cranch*, 169, 382.)

The distinction thus taken by Sir William Scott is inherent, not in the organization of the *British* courts alone, but in the principles on which they rest. Hence, the proceedings in British admiralty, as well as in American courts, have conformed to the same inherent and fundamental rules. This will be more fully apparent in future references to authority. Indeed, if there were no cases to which to appeal for direct adjudications upon the point, the doctrine would be deducible, logically, from the elementary principles of international and municipal law. In the former, the rules of ethics and right reason, as applied to independent and equal societies or States, would necessarily obtain, irrespective of local, transient, or internal circumstances. What becomes a nation in its conduct towards equal sovereignties, may not become a sovereign in his treatment of his own subjects. In the former case he is an equal among equals, with no power over them to enforce his commands, and with no right, for the especial interests of himself or realm, to insist upon their obedience to such rules as he may prescribe. In the municipal administration of affairs he is guided by intra-territorial considerations; he is not bound to consult the wishes or adopt the internal policy of other sovereigns.

The people of each nation must determine their own internal form of government according to their own views of happiness and duty. It is a question with which foreign powers have no right to interfere. On no other principle is it possible for a nation to be independent or free. But, as one of a family of nations, it must consult the well-being and safety of all—or, at least, do nothing to injure unnecessarily the equal rights of others.

In that relationship there is no common tribunal to which they can

appeal for an impartial adjudication of their controversies; hence the *ultima ratio regum*—the dread arbitrament of arms. The nearest approach to such a tribunal is a prize court—a tribunal which, it is said, each maritime nation is bound in good faith and justice to provide, for a just application of international rules to all *maritime* captures and disputes. As the rules which such courts enforce are common to all civilized countries, it is obvious they should not be controlled in their decisions by the local, selfish, or transient interests of any one nation; in other words, they should be governed, not by municipal, but by international law. Hence, when an admiralty court, however commissioned, sits as a prize court to adjudicate upon questions of belligerent and neutral rights, its sphere of duty is necessarily different from that of municipal tribunals, and its action should accord with its duty. As in England the same judge presides on the prize and on the instance sides of the admiralty court, so it is in the United States. Indeed, the same judge, in this country, in other courts is often charged both with common law and equity duties; yet he never confounds the distinctive principles respectively applicable to them. So is it with this jurisdiction in admiralty. He has two distinct systems of jurisprudence to administer, and must never confound them.—(*Schooner Sally*, 1 *Gall.*, 401; 13 *How.*, 498; and the other cases cited elsewhere in this opinion.)

The practice in all civilized countries has generally conformed to these plain rules, and in no instance can it justly ignore them. Thus, revenue and navigation acts, in the United States and England, are sometimes enforceable on the admiralty or maritime side of courts, sometimes on the exchequer or common law side. If reference is had to the admiralty side, it is in instance or civil causes alone. The libels of information are based on municipal statutes, and the rules of pleading and procedure conform thereto. They are subject to municipal direction and control. As no nation can justly impose its laws upon other than its own subjects, or beyond its lawful jurisdiction, so other nations have no legitimate right to interfere with its municipal administration. Its municipal code—whether prohibitory or not—resting upon municipal sovereignty for its sanction, is to be enforced in such manner and by such tribunals as that sovereignty may create therefor. By whatever name known, they are still municipal tribunals. This distinction cannot be ignored without confounding essential principles applicable respectively to intra-territorial and extra-territorial action. Every magistrate, by whatever name known, whether King or President, who represents any portion of sovereign power, is, so far as his authority over internal affairs is concerned, only what the internal constitution of the country makes him. In his intra-territorial action he is to be judged by that constitution and the laws under it. But so far as all foreign nations are to be affected, he

must stand, if his own country so elects, as its representative extra-territorially or in its foreign affairs—as an independent and coequal sovereign among sovereigns.

Intra-territorially his power may be limited, and he may be amenable to municipal constitutions and laws for any abuse of his trust, domestic or foreign; but no foreign sovereign can call him to account for violation of municipal laws, but only for infractions of international laws which are exclusively extra-territorial in their operations or jurisdictional sphere. It is by not attending strictly to this immutable distinction that great errors often creep into grave discussions upon powers and duties. Constitutional law is intra-territorial; international law is extra-territorial. The former belongs to one nation alone for its internal government, and is cognizable by no other, except so far as it voluntarily subjects itself or its citizens thereto; the latter belongs to all nations, is universal, and controls the conduct and relations of States and peoples, as distinct societies, in all their intercourse with each other, whether in peace or war. It may be that, by treaties or compacts, two nations, so far as their conduct towards each other is concerned, adopt a conventional rule, but such a rule is binding, not on third powers, but on themselves alone.—*Wh. El.*, 432, 157, 169.

It was in accordance with these simple truths that the United States regulated its action during the revolt of the Spanish-American colonies. As held in Rose *vs.* Himely, (4 *Cranch*, 201,) and uniformly decided by the Supreme Court, this country, as an independent power, would not interfere between a parent country and its revolted colonies, or between the so-called *de jure* and *de facto* sovereigns of any other nation. During their military struggles with each other, whether for ascendency at one time, or respectively for subjection and independence at another, the question of right or policy between them was purely internal—intra-territorial or municipal—with which this nation could not interfere without undertaking to determine for other countries what should be their internal forms of government, and thus constituting itself the master of every people or nation struggling to establish a municipal system according to its own views of happiness or interest. In all such cases the mother country, or *de jure* sovereign, considered those in arms against the old order of things, "insurrectionists" or "rebels," whilst the resisting colonies acted on the theory of their own national independence. From the stand-point of the former it was a rebellion; from the stand-point of the latter it was a foreign war. The one was struggling to enforce obedience to rightful authority, the other to repel an attempt at invasion or subjection. Third powers could only recognize the fact that such a dispute was raging. To pronounce the contest either a rebellion or unjust invasion, would be to pass upon the very question in dispute—to assume the office, if not of

magister litium, at least of arbiter of other peoples' destinies. Wars of unjust intervention in such cases furnish the bloodiest pages in history.

During the revolutionary struggle which resulted in American independence, similar legal propositions were respectively upheld in this country and in Great Britain. The latter treated the contest as a "rebellion," and, consequently, has dated our national existence from the time when the treaty acknowledging our independence was signed; whilst the American date is from the Declaration of Independence. Claiming sovereign municipal rights over the colonies, and the laws of nations not being applicable to that contest, from the British stand-point, Parliament proceeded at an early day to pass laws to meet the supposed exigency. As the colonists, though in revolt, were not *enemies* in legal acceptation, and consequently the laws of nations, which are applicable only to independent sovereignties, did not meet the emergency, new statutes were at once adopted. Those statutes rested for their validity, not on the laws of nations, but upon British municipal sovereignty. Hence, the non-intercourse and prohibitory acts of Great Britain were not justiciable in a prize court, *as such;* they were no part of international law, but were like her colonial revenue and navigation acts. The subjects of third powers who attempted to trade with the revolted colonies, despite those municipal regulations, were, if caught within the municipal jurisdiction of Great Britain, made to answer in the penalties prescribed; just as, in times of profound peace, each nation enforces its laws upon all within its territorial jurisdiction; and just as England has always enforced her colonial and navigation acts. As to the colonists themselves, on the theory of parliamentary omnipotence, the most rigorous measures were prescribed. There was no constitutional question raised in England, although a different theory, even as to the British constitution, obtained in the colonies.

The mode of adjudicating at that time upon the captures made under the British prohibitory act, ought to shed light upon the point. Unfortunately the British admiralty decisions of that time, with few exceptions, are not accessible in St. Louis. Still, from those consulted, it seems that the precise question, *in principle*, which has been presented in these cases, was raised, discussed, and decided in the British admiralty courts after elaborate argument. The decision made in a case by Sir John Hay, we are informed by his successor on the same bench, was not law; and Sir John Hay subsequently admitted his error. As the capture under adjudication by him was an American vessel, made under peculiar circumstances, it became necessary to decide whether it was lawful *prize of war*, or merely confiscable under the prohibitory act. Much of the argument had reference to points of no importance in this country, relating solely to the mode of distributing the proceeds, whether

to the captors as *prize of war*, or to the exchequer, or as *droits* of admiralty. The opinion of Sir James Marriott, and the able arguments in the case, together with the fact that Sir John Hay subsequently retracted his adverse opinion, make the case clearly applicable on this point, viz: that such cases are not "*of prize of war*," but "of forfeiture as rebel property." Subsequent judgments conformed to that rule. Enemy property is *prize of war;* but a traitor is not an "enemy" in the legal sense.—*Bacon's Ab., "Treason G.;" Marriott's Decisions*, 1, 76, 197, 222; *Charge to the grand jury, U. S. circuit court for Missouri, special July term*, 1861; *Opinion of Justice Swayne, U. S. circuit court for Ohio.*

If he were an "enemy," he would be the subject of another sovereignty, to which his allegiance would be due. Great Britain and her jurists were careful to avoid, at that stage of the controversy, any such implied admission of independence. Asserting her municipal sovereignty over her American subjects, she passed rigid laws for their punishment, and for the annihilation of all friendly intercourse with them, even confounding in the terms used, the innocent with the guilty. But the adjudications found in "Marriott's Decisions" softened those rigors, by placing an interpretation upon the statute which, though not in accordance with its literal reading, was held more consistent with its general scope and object.

The following is so much of that statute as is essential to a correct understanding of the point now under consideration:

"Whereas many persons in the colonies of New Hampshire, &c., have set themselves in open rebellion, in defiance to the just and legal authority of the King and Parliament of Great Britain, to which they ever have been, and of right ought to be subject, and have assembled together an armed force, engaged his Majesty's troops and attacked his forts, have usurped the powers of government and prohibited all trade and commerce with his kingdom and the other parts of his Majesty's dominions; for the more speedily and effectually suppressing such wicked and daring designs, and for preventing any aid, supply, or assistance being sent thither during the continuance of the said rebellion and treasonable commotions, be it therefore declared and enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in the present Parliament assembled, and by the authority of the same, that all manner of trade and commerce is, and shall be, prohibited with the colonies of New Hampshire, &c., and that all ships and vessels of, or belonging to, the inhabitants of said colonies, together with their cargoes, apparel, and furniture, which shall be found trading in any port or place of the said colonies, or going to trade or coming from trading in any such ports or places, shall *become forfeited* to his Majesty as if the same were the ships and effects of *open enemies*, and shall be so adjudged, deemed and taken in all courts of admiralty, and in all other courts whatever."—31 *British Stat. at Large*, 135.

The other provisions of the act related to *proceedings* against such captured property as *lawful prize*, &c. There can be no doubt, on reading

the whole act, that it designed to subject all such property to capture *as prize*, yet it guardedly avoids the error of denominating those in arms against Great Britain "enemies," but says their property *shall become* forfeited as if belonging to open enemies. In this country the insurrectionists have been appropriately termed *quasi* enemies by Justice Nelson and Justice Swayne; and other judges have been careful to observe the distinction between enemies and traitors. They are traitors none the less in the eyes of the law because the insurrection is of large proportions, and, in certain aspects of the controversy, are lawfully treated *as if* enemies—*quasi* enemies—and even held and exchanged as prisoners of war. In that no legal inconsistency exists. During a foreign war, *American* property found trading with the enemy is condemned *as if* enemy property—it is "adherent to the enemy," and takes its character from its employment. The President of the United States in whom is vested the pardoning power, is also commander-in-chief of the army and navy, and it is his duty, also, "to cause the laws to be faithfully executed." Hence rebels taken in arms *flagrante bello*, are also traitors caught *flagrante delicto;* he may pardon them, hold them as prisoners of war, or turn them over to the courts to be tried for treason.—*Case of Luits, U. S. Circuit Court for Missouri; Case of Hicks and Cocke, U. S. Dist. for East. Dist. of Missouri.*

In the English decision to which reference is made, (*The Dickenson, Marriott's Decisions, p.* 1,) the point in the argument was, that the *forfeiture* was by force of the statute a *municipal* forfeiture and prize, and not a capture and prize *jure belli;* consequently the judgment or decree should conform, and be "*forfeited as rebel property*," or declared "*a prize of forfeiture*," instead of "*prize of war.*"

The case of the *Walsingham Packet* (2 *Rob. Adm. Rep.*, 77) does not hold a contrary doctrine, but merely that a claimant in a prize suit who has forfeited his interest by a violation of a municipal statute, shall not have the *res* restored to him. The opinion of Sir William Scott indicates quite clearly that if the proceedings had been for a forfeiture under the statute, the judgment must have been one of *forfeiture*, and not of *prize of war.*

Justice Story (2 *Gall.*, 210—*The Saunders*) held that prize proceedings and informations for forfeitures under statutes cannot be blended. To the same effect are many decisions in the United States district courts and in the United States Supreme Court.—*The Dimon*, 2 *Gall.*, 306.

When the practice and pleadings in these cases come to be considered more directly in their details, the many objections to such a mixed course will be more fully and specifically stated.

In confirmation of the views already presented, reference may be made to the many decisions in Great Britain and in this country, and to the form of proceedings in admiralty for forfeitures under municipal statutes,

clearly showing that the distinction contended for has been nearly, if not quite, universally observed. Under the British and American acts prohibiting the slave trade, which (not being contrary to the laws of nations) rested for their obligatory force upon municipal sovereignty—also, under the several non-intercourse, and embargo, and non-importation statutes, &c., proceedings were instituted by libels of information or informations (as the cases might require) on the *instance* side of the court. Indeed, in some of those cases, it was expressly held, that though the forms of proceedings as regulated by the statute were in the nature of prize, and the captors were entitled to prize money, yet the cases were not prize within the meaning of even the general prize acts of the United States; they were not prizes of *war*, because not captures *jure belli*.

The Recovery, 6 Rob. Adm., 348.
The Hope, 2 Gall., 48.
The Saunders, 2 Gall., 210.
The Eliza, 2 Gall., 4.
The Dimon, 2 Gall., 306.
United States *vs.* The Hunter, Pet. C. C. Rep., 10.
Clark *vs.* United States, 2 Wash. C. C., 522.
United States *vs.* The Nancy, 3 *ib.*, 281.
The Huntress, Davies, 83, (note.)
Jecker *vs.* Montgomery, 13 How., 498.
Hooper *vs.* 51 Casks, &c., Davies, 371.
Gelston *vs.* Hoyt, 3 Wh., 246.
United States *vs.* 1960 Bags, &c., 8 Cranch, 405.
The King *vs.* Whittaker, 1 Hagg., 145.
The Adelaide, 2 Hagg., 230.
The Woodbridge, 1 Hagg., 63.
The Union, 1 Hagg., 32.
The Diana, 1 Dods., 95.
Little *vs.* Barcme, 2 Cranch, 170.
Schooner Paulina's Cargo, 7 Cranch, 52.
Murray *vs.* Schooner Charming Betsey, 2 *ib.*, 64.
Schooner Hoppet *vs.* United States, 7 *ib.*, 389.
Brig Penobscot *vs.* United States, 7 *ib.*, 356.
The Adventure, 8 *ib.*, 221.
Ship Richmond, 9 Cranch, 102.
Cargo of Ship Fanny, 9 Cranch, 181.
The Octavia, 1 Wheaton, 20.
The Edward, 1 *ib.*, 261.
The Pitt, 8 Wh., 371.
The Frances & Eliza, 8 *ib.*, 398.
Sloop Active, 7 Cranch, 100.

The William King, 2 Wh., 148.
Brig Eliza, 7 Cranch, 113.
Josefa Segunda, 5 Wh., 354.
The New York, 3 Wh., 59.
The Yacht Wanderer, Sprague, 515.
The Glamorgan, *ib.*, 273.
Schooner Sally and Cargo, 1 Gall., 58.
The Brig Ann, 1 Gall., 62.
Sloop Nancy, 1 *ib.*, 67.
Brig Short Staple, 1 *ib.*, 106.
Schooner Friendship, 1 *ib.*, 111.
Sloop Falmouth, 1 *ib.*, 130.
Brig Wasp, 1 *ib.*, 140.
Ship Argo, 1 *ib.*, 150.
10 Hogsheads of Rum, 1 *ib.*, 188.
Schooner Mary, 1 *ib.*, 206.
Brig Rose, 1 *ib.*, 211.
The Mars, 1 *ib.*, 237.
Schooner Boston, 1 *ib.*, 239.
Schooner Orono, 1 *ib.*, 138.
Schooner Rapid, 1 *ib.*, 295.
Schooner Sally, 1 *ib.*, 401.
Brig James Wells, 7 Cranch, 22.
The Julia, 1 Gall., 43.
Schooner Friendship, 1 *ib.*, 177.
The William & Grace, Marriott's Dec., 76.
The Rebeccah, *ib.*, 197.
The Renard, *ib.*, 222.
The Porpoise, 2 Curtis, 315.

An analysis of these cases will show, that where forfeiture is by force of a municpal statute instead of the law of nations, although the words "capture and prize" are used in the act, the proceedings are on the instance side of the court. Judge Sprague, in the case of "Glamorgan," presents very clear views on the point. (Also, 2 *Curtis*, 315.)

The distinction with respect to *prize* and instance jurisdictions is also insisted upon where libels have been filed at the same time on both sides of the court. Thus in "*The Eliza*," where the claim was rejected, (the vessel having been libelled on the instance side,) it was ordered to be held for prize proceedings. And where a libel of information was drawn under one section, and at the hearing it appeared the forfeiture was under another section, it was held bad. (*United States* vs. *The Hunter*, *Pet. C. C. Rep.*, 10.) If the trial is on the prize side, and both captors and claimants are defeated, the United States may interpose a claim for

municipal forfeiture, (*The Brig Gefia*, 1 *Mason*, 88.) In the case of the "Schooner Rapid," (1 *Gall.*, 314,) Justice Story alluded to the irregularity in practice, in making a seizure for a municipal forfeiture, pending prize proceedings. He stated the proper course to be, to interpose a claim in the prize case; that no principle authorized the other practice. It is unquestionably correct, according to both the English and American practice, for the court which first obtains jurisdiction to retain it until final adjudication. As the decree and sale give a valid title against all the world, whether made on the prize or instance side, it becomes necessary, in order to avoid endless difficulty, that all claimants and persons who can intervene *pro interesse suo* should do so in the original suit. This follows as a necessity, also, in those cases where municipal forfeitures are swallowed up in the more general operations of the laws of war, (*The Sally*, 8 *Cranch*, 352;) and, therefore, if prize condemnation ensued prior to the adjudication on the instance side, the lien for forfeiture and all rights under it would be practically lost. So, if suit is first instituted on the instance side, the prize captors can come in, and as claimants have the conflicting and relative demands of the contesting parties heard. If they succeed in defeating the instance suit, it may be a question whether the court would not then require the captors to file a libel on the prize side, and retain custody of the property to await the result, or whether it would, as an incident to the instance suit, proceed to final adjudication. The intimations by courts are in favor of the former practice, and principle leads to the same conclusion. On the instance side the court would so far hear the demand of the captors as to determine (as in all other cases of claimants) that the property ought to be restored to them. When so restored, prize law would demand the immediate institution of the proper proceedings. Such conflicts can hardly arise, however, if the law be faithfully observed, for the prize-right of captors depends, as a general rule, on possession obtained and held.—2 *Gall.*, 42; 8 *Cranch*, 189, 368; 7 *Wh.*, 355.

In this no reference is made to recaptures, for they depend upon other considerations. If the captors send the vessels and property in, as required, with a prize crew, and turn them over to prize commissioners, there can be no interval in which the property would be subject to an instance seizure so that the instance court could acquire jurisdiction; for its jurisdiction generally depends on seizure. So, on the other hand, if the property was in the custody of the instance court, how could it become subject to prize capture; or, if previously captured, how could the possession of the captors, prize crew, and commissioners have been lost, without abandonment or gross neglect on their part?

These suggestions serve to mark the ineffaceable distinction between prize proceedings *jure belli* on the one side, and civil and maritime causes

on the other. Whilst it seems clear that, in England, the distinction has never been ignored, it is also obvious that in the United States it has seldom, if ever, been disregarded. The distinction does not spring from the different modes of commissioning the judges in the two countries, but from the subject-matter, and the inherent principles of law on which it rests. In Great Britain the instance judge, by virtue of his general commission to preside in admiralty, receives no authority to hear and dispose of prize causes. He hears merely what Lord Mansfield denominates "causes, *civil* and marine." As all captures from the enemy belong to the sovereign, he decides either for himself, or deputes another to decide for him, whether the capture was lawful prize. Hence the prize commission sent at the outbreak of each war to the admiralty judge. In the United States, however, where the municipal constitution is based on a different theory—where the sovereignty of the country is not in an hereditary monarch, but in the people, and where delegated powers from the sovereign people are by virtue, not of temporary commissions, but of organic law—the federal judiciary is clothed with the sole right to decide on questions of prize and "all cases of admiralty and maritime jurisdiction." It needs no special commission from the Executive.

The United States Supreme Court (*Jecker* vs. *Montgomery*, 13 *How.*, 515) held that "under the Constitution of the United States the judicial power of the General Government is vested in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish. Every court of the United States, therefore, must derive its jurisdiction and judicial authority from the Constitution or the laws of the United States; and neither the President nor any military officer can establish a court in a conquered country and authorize it to decide upon the rights of the United States, or of individuals in prize cases, nor to administer the law of nations." And the same rule was decided to prevail with respect to courts within the territorial jurisdiction of the United States.—*United States* vs. *Ferreira*, 13 *How.*, 40.

But the jurisdiction of the United States admiralty courts, as instance courts, is more extensive than in England. In the latter country the conflict between the common-law and the admiralty courts resulted in excluding the latter, in instance suits, from proceeding on matters occurring *infra corpus comitatus;* but on the prize side, as was contended in *Lindo* vs. *Rodney*, their jurisdiction was not thus restricted. Whatever doubt and difficulty as to instance jurisdiction may have existed in Great Britain (2 *Browne, C. L.*, 29, 208) cannot arise in this country now, (*The Huntress, Davies*, 83, *Note.*) After a long forensic contest, it was settled that the grant in the United States Constitution was broader than the restricted powers known to English courts; that the words "all cases of admiralty and maritime jurisdiction" were used, in part, to exclude

so narrow a conclusion. The words "admiralty" and "maritime" are not synonymous. They embrace all captures in maritime war as prize, and all civil causes of a maritime nature. Under that constitutional grant the judiciary act was passed, vesting in the district courts the jurisdiction already mentioned.

The Huntress, Davies, 83, Note.
The Rapid, 1 Gall., 295.
Schooner Sally, 1 Gall., 401.
The Sandwich, 1 Pet. Adm., 233.
The Jerusalem, 2 Gall., 398.
3 Dall., 397, 301; 2 Cranch, 406; 4 Cranch, 452.
Keene *vs.* United States, 5 Cranch, 304.
Whelan *vs.* United States, 7 Cranch, 112.
The Genessee Chief, 12 Howard, 443.
Waring *vs.* Clark, 5 Howard, 441.
12 Howard, 446; 1 Wheaton, 238; 4 Wheaton, 298; 5 Wheaton, 385.

The United States district courts, then, have jurisdiction of all maritime causes, whether instance or prize; and of all seizures under the United States revenue or other laws, whether made on the high seas, or on rivers navigable for vessels of ten tons burthen, or on land. They are at one and the same time prize courts, instance courts, and common-law or exchequer courts. They administer the laws of nations as prize courts, and sometimes general maritime or municipal law as instance courts; and also, as instance or exchequer courts, the municipal statutes. The extent of their jurisdiction, as thus conferred, has been the subject of many adjudications; yet no one has ever contended that when the jurisdiction of the *court* was clear and undisputed, it could proceed indiscriminately in all cases, and confound prize, instance, and common-law causes. Each class is governed by its own rules; a disregard of which would work not only confusion, but inexcusable violations of legal rights. Nothing but injustice could flow from such an arbitrary and reckless disregard of established barriers. "*Optima regula est, qua nulla est verior et firmior in jure, neminem oportet esse sapientiorem legibus.*"—7 *Coke*, 1.

The extent of the prize jurisdiction in this country, so far as vested in the United States district courts, has been already referred to in connection with the intimations of Justice Story, in the case of "*The Emulous.*" The remarks of the United States Supreme Court in the case of *Brown* vs. *The United States*, (8 *Cranch*, 110,) settle nothing as to this point. The property in that case was treated in the circuit court as *water-borne*—in "a creek or dock where the tide ebbs and flows." In the Supreme Court the point was not noticed, because not necessary to the decision, in the view there taken of the case. The direct question was before the supreme court of Connecticut in 1816, (*Slocum* vs. *Wheeler*, 1 *Conn.*, 429.)

That court held that a seizure on land, except as a naval capture within the rules previously stated, could not be *prize of war*, and consequently the decree of the United States district court, on its prize side, with respect to that land capture, was *coram non judice* and void. The opinions pronounced in that case notice carefully the distinction between the common-law and admiralty sides of the district court, and admit that it is competent, within the rule established in Brown *vs.* The United States, to confer upon United States courts jurisdiction of land captures; but, after an elaborate examination of authorities, it was held that no such jurisdiction, at that time, had been vested. That case is important with respect to the construction put upon the judiciary act, whose terms include "all seizures on land," &c., made under the laws of the United States. It is evident that those seizures, referred to in the judiciary act, were construed to mean municipal seizures. To the same effect are several of the cases already cited. The United States Constitution, however, gives jurisdiction "in *all* controversies where the United States are a party," and the suggestion that none but personal actions are included within that provision is against both the language used and all adjudications under it. In all informations and libels of information to enforce forfeitures, &c., under revenue, or prohibitory, or any other municipal statutes, where the action is brought in the name of the United States, the United States are a party; the controversy is necessarily one instituted and prosecuted or pursued by the United States, it matters not what mode of procedure is adopted. Congress can vest such jurisdiction in the district courts, because the grant of power is broad enough for the purpose.

In the remarks already made on the subject of *booty*, it was intimated that such land captures were not cognizable in the British admiralty courts as such.—*Comyn's Dig. Admiralty, F.*, 1.

Their jurisdiction as prize tribunals was confined to naval operations, or such as were carried on conjointly with a land force. After the modern British statutes were passed, it was competent to refer booty cases to those courts, just as it may be competent for Congress to vest United States district or circuit courts with such jurisdiction. Hence, the cases mentioned by *Phillimore*, and those found in British Reports, (*Alexander* vs. *Duke of Wellington*, 2 *Rus. & M.*, 35; *Army of Deccan*, 2 *Knapp*, 152; *French Guiana*, 2 *Dods.*, 151; *Tarragona*, 2 *Dods.*, 487; *Genoa*, 2 *Dods.*, 446, &c., &c.,) do not throw any light upon the point under consideration.

It is necessary to mark, however, the distinction existing between the international and the common-law rules on this subject. In *Goss* vs. *Withers*, (2 *Burr*, 685,) and in *Cook* vs. *Howard*, (13 *Johnson's Reports*, 276,) the ancient and modern authorities are fully considered. Those cases refer to recaptures on land and the rights supposed to depend

thereon. The conclusion reached was, that a capture on land cannot be considered as vesting any right in the captor until the *spes recuperandi* is lost; which cannot be the fact until the battle is ended, or twenty-four hours' possession has followed, or the property been brought *infra præsidia;* that while in *maritime* captures the title does not pass, in modern times, before judicial condemnation, no such adjudication is deemed necessary in *land* captures; that the common law formerly may have given property taken on land to the captor, but that booty is now held to belong to the sovereign, &c. The American rules and articles of war have adopted the same principle, and seem also to recognize the distinction between booty, and plunder or pillage:

"ART. 58. All *public* stores taken in the enemy's camp, towns, forts, or magazines, whether of artillery, ammunition, clothing, forage, or provisions, shall be secured for the service of the United States; for the neglect of which the commanding officer is to be answerable."

Under that rule, cases of land capture would not be likely to come before civil courts for adjudication. The species of property mentioned (if taken in such places) falls within the definition of *booty.* It is public, and not private property, that may be captured; and in vain, it is apprehended, will search be made through American statutes, decisions, or diplomacy, for any permission to non-commissioned or commissioned persons to indulge in indiscriminate plunder or pillage, especially from peaceful inhabitants of an enemy country, or from non-combatants. No right, as captor, vests in any person. Military commanders must secure all *public* stores for the use of the United States. If, incidentally or otherwise, a question of capture or recapture on land should come before an American court, it would have to be decided according to the foregoing rules. The policy underlying such statutes may have primary reference to military discipline, but, nevertheless, they indicate the American view of what the laws of modern war demand. That view was expressed, soon after the adoption of the United States Constitution, in the case of *Talbot* vs. *Janson,* (3 *Dall.,* 133.) And all American legislation, diplomacy, and decisions have, in the main, corresponded with Justice Iredell's opinion: "War can alone be entered into by national authority; it is instituted for national purposes, and directed to national objects; and each individual on both sides is engaged in it as a member of the society to which he belongs, not from motives of personal malignity and ill-will. He is not to fly like a tiger upon his prey, the moment he sees an individual of his enemy before him. Such savage notions, I believe, obtained formerly. Thank God! more rational ones have succeeded." (Also, *Turnbull* vs. *Ross,* 1 *Bay,* 20:) War is to be waged not from selfish ends, but to secure stable peace on just and equitable bases. It is open and armed opposition, not personal hate, malice, or malignity.

It is not for vengeance, but may be for redress. It is not for the sake of war, but to conquer just and certain peace. "*Hostis non inimicus est.*"

The principle upon which the British prohibitory act was based, has undergone frequent discussion in both British and American courts, and been argued from the same standpoint, in cases where the property of a *subject* was taken trading with an enemy, and the question was, whether it was lawful "prize of war." All property belonging to citizens of the adverse belligerent, or to persons domiciled in his country, if found afloat on the high seas, is unquestionably lawful prize, (*The Venus*, 8 *Cranch;*) but on what theory, *jure belli*, is the property of a citizen at home, and there domiciled, so considered? Its owner, according to the arguments urged, may have violated the non-intercourse or prohibitory acts of his own country, or may have committed treason, yet cognizance of those offences belongs solely to the municipal administration of his own sovereign. So, if seizures were made within the territorial jurisdiction of the latter, why are they not exclusively of municipal jurisdiction? The answer has been, that the guilty subject in a foreign war has violated the laws of war, which forbid all intercourse between the inhabitants of hostile nations, while at the same time he may have been guilty of a breach of allegiance. Prize courts, as such, take cognizance of the former offence, and condemn the property so used for the enemy's benefit, because it is *quasi* enemy's property, or, in the language of the courts, is taken while "adherent to the enemy." The municipal offence may be punished by his sovereign according to the municipal code; by fines, forfeitures, penalties, imprisonment, or otherwise, as that code dictates. As a traitor the person may be tried and hung for "giving aid and comfort to the enemy," if the municipal law so requires; or he may be subject to a fine or to heavy penalties, &c., as under the laws in force during the war of 1812. The jurisdictions, however, were different.

The Nelly, 1 Rob., 219.
The Indian Chief, 5 Rob., 19.
Bell *vs.* Gibson, 1 Bos. & Pul., 345.
Gist *vs.* Mason, 1 T. R., 85.
Tintando *vs.* Rogers, 3 Bos. & Pul., 197, 199.
Potts *vs.* Bell, 8 T. R., 549.
1 Rob., 165; 4 Rob., 78; 5 Rob., 224, 265.
The Julia, &c., 1 Gall., 594; affirmed in Julia, &c., 8 Cranch, 181.
The Joseph, 1 Gall., 545.
The Tulip, 3 Wash. C. C., 181.
The Hoop, 1 Rob., 196.
The Rapid, 8 Cranch, 155, 421.
The Rapid, &c., 1 Gall., 295, 303, 545.
Jecker *vs.* Montgomery, 13 How., 498.

Jecker *vs.* Montgomery, 18 How., 114.
The Rugen, 1 Wheat., 62.
The Joseph, 1 Gall., 545.
The Joseph, 8 Cranch, 451.
Liverpool Packet, 1 Gall., 543.
The Alexander, 8 Cranch, 169.
The Sally, 8 Cranch, 382.
The Sally, 1 Gall., 401.
The Recovery, 6 Rob., 341.

In the consideration of these cases, thus far, it has been deemed advisable to give at greater length than was necessary, at each particular stage of the inquiry, the general principles which must govern, in order to avoid repetition. Many of those principles will be briefly invoked in the applications to be hereafter made.

As the law stood before the commencement of the present rebellion, there was no jurisdiction *in rem* in United States district courts, of seizures on land, except under special statutes. As prize courts, they had no such authority, unless made by naval forces or commissioned vessels, under the circumstances and within the limits mentioned. Have the recent statutes given them full jurisdiction, not *jure belli*, (for municipal statutes have no such force under the laws of nations,) but *municipally?* It is well settled that "An act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains," so far, at least, as belligerent and neutral rights, and commerce, are to be affected thereby. (*The Charming Betsy*, 2 *Cranch*, 64.) But the cases before this court now, have nothing to do with neutral rights, or with public enemies, technically so called. As has been held by this court in several cases during the existing rebellion, the propositions, so far as either rebels or loyal citizens are concerned, are of constitutional and statutory or municipal, and not of international law. The rebels are subjects *de jure*, bound by the Constitution and the laws of the United States. Their insurrection has not absolved them from their allegiance. They have embarked in giant enterprises of a military and treasonable nature to break that tie; but they can never be treated by the judiciary as having accomplished that object so long as the political department adheres to its duty. They have not in American courts belligerent rights and immunities under the law of nations, for they do not belong to the family of nations. No power has yet recognized them as a member of that family; and if it had, the recognition would be obligatory on no other than the recognizing power, and least of all upon the United States government. That foreign power and its subjects would be estopped by that recognition, or by a recognition of a state of belligerency, from disputing in our courts that captures of foreign vessels and property are to

be governed by the rules of maritime warfare. The act of the foreign sovereign declaring neutrality would fix the status of all his subjects. The governmental organization of the rebels is, in a legal point of view, in American courts, only an insurrectionary organization. Every provision of the United States Constitution, treaties, and statutes is still obligatory upon them. When the courts are so far obstructed in the administration of justice as to be unable to enforce ordinary process in the usual manner, then civil war exists; or, as the United States Constitution and laws define the condition, a *state of insurrection*. So all jurists and publicists have held, and so the acts of 1795 and 1861 and the adjudications upon them maintain.

Vattel, in his chapter on civil war, presents views which, however much to be commended in some particulars on the grounds of policy and humanity, are wholly indefensible in other respects, and as legal propositions. If they were universally true, *every* rebellion would necessarily lead to a temporary suspension or abdication of all rightful authority or municipal sovereignty. However wise his suggestions may be concerning such civil wars in Europe as are inaugurated for merely dynastic changes, where contending aspirants are struggling for a throne, they certainly can have no application to revolts against the fundamental organization of society, where the political or social opinions on which an insurrection is based divide the people of the same districts, towns, and even households. It is impossible, under such circumstances, however it may be in revolts by defined geographical boundaries, to treat the revolting party or faction *quoad hoc* as an independent nation, and to apply all the rules of international warfare. There is no possible *mode* of working a complete separation of the antagonists into distinct organizations, so that they may hold dominion over different portions or districts of country, and be thus subject exclusively, for the time being, to the commands of their respective leaders. If the ordinary laws of war should be applied to them when the opposing partisans are commingled indiscriminately in every neighborhood, his theory would work greater, instead of less, calamity to the whole people. The object for which he contends would be defeated by the policy he urges. But the wisdom of such a policy, however, is for the sovereign to determine in each case. The question is not an international one, and does not fall under the law of nations.—3 *Phillimore*, 503; 7 *How.*, 1.

The modes of proceeding in such cases must be determined by the internal constitution of the country. In Great Britain, many statutes were, from time to time, adopted, in order to mitigate the severities of the old municipal law in such cases, even going to the extent of excusing obedience to a *de facto et non de jure* sovereign, under particular circumstances. (4 *Black*, 77; *Forster's Crown Law*, 399; 3 *Inst.*, 7.) To the same gene-

ral effect are the American decisions concerning portions of country temporarily under hostile dominion, and the inhabitants thereof.—2 *Gall.*, 235, 501; 4 *Wheaton*, 246, 254; 9 *Cranch*, 191; 3 *Pet.*, 99, 242; 9 *How.*, 603, 615.

The United States Constitution expressly refers to and provides for *different kinds* of war. In foreign wars the laws of nations govern; such has been the universal ruling by American courts; and the principles already stated leave no other logical conclusion. Blackstone (*vol.* 4, *p.* 66) states the rule and the reason thereof very succinctly: "The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world. * * This general law is founded upon this principle, that different nations ought, in time of peace, to do one another all the good they can; and, in time of war, as little harm as possible without prejudice to their own real interests. And as none of these States will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those principles of natural justice in which all the learned of every nation agree, or they depend upon mutual compacts or treaties between the respective communities; in the construction of which there is also no judge to resort to, but the law of nature and reason being the only one in which all the contracting parties are equally conversant, and to which they are equally subject. In arbitrary States this law, wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power; but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted, in its full extent by the common law, and *is held to be a part of the law of the land.* And those acts of Parliament which have, from time to time, been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; *without which it must cease to be a part of the civilized world.*"

To the same effect in this country are all American decisions, and the language of the United States Constitution. Congress has "power to define and punish offences against the law of nations," "to declare *war*," &c., but "the rules of warfare established among civilized nations cannot be lawfully transcended" in dealing with foreign powers. (Brown *vs.* The United States, 8 *Cranch*, 153.) And the grants of power to the judicial department directly recognize the same principles, and have always been exercised in accordance therewith. But Congress has also "power to provide for calling forth the militia to execute the laws of the Union,

suppress *insurrections*, and repel *invasions*," and "treason" is defined to "consist only in levying war against the United States; or in adhering to their enemies, giving them aid and comfort." In those clauses, internal or domestic war is referred to, as well as foreign wars. Resistance to the execution of the laws, insurrections, and "levying war," which may call for military action, are as distinctly provided against, when made by American subjects, as are invasions or foreign wars. Treason may consist either in active participation against the United States in such a domestic conflict, or in giving aid and comfort to the foreign foe during foreign wars; that is, if the offender owes either qualified or absolute allegiance to the United States. The first class of treasons has been judicially settled to include all assembling in an armed and threatening manner for the general purpose of preventing any law from being enforced, if done with the view of overthrowing any law by force or violence. It is obvious that such levying of *war* may be confined to a small district, and to comparatively a small number of persons; yet it is *war* within the meaning of the Constitution. If, then, Vattel's suggestions were to hold good universally, such a comparatively insignificant outbreak might involve the necessity of proceeding according to all the formal rules of civilized warfare in the various measures taken to suppress even such a movement. Indeed, the law of treason, which is necessarily municipal—for it involves merely the breaking of the tie between the sovereign and his subject—would become a nullity. If the traitor must be treated only as an enemy not governed by the municipal but by the international code, he could be held only as a prisoner of war, but not as a traitor, nor could he be punished for his treason. To such strange anomalies, subversive of all the ties and duties of allegiance, and of all power to enforce them, does Vattel's theory lead, if accepted in its whole length and breadth. And, on the other hand, if every war recognized by the Constitution, instantly, and of its own force, clothes any one or more departments of the Government with absolute power, or powers unknown to the Constitution, or prohibited by it, then the other strange anomaly must exist, viz: the instant overthrow of the Constitution as an organic and supreme law by any act of treason, however insignificant in proportions, which may chance to be committed in any part of the country by any number of citizens, however inconsiderable. In other words, the resistance to be overcome leaves no constitutional power to be exercised against it; for if the Constitution ceases to be obligatory because it is assailed, then it expires whenever assailed, and no one has any constitutional authority to defend the annihilated source of authority.

Such, fortunately, is neither logic nor law. In the municipal administration of affairs, during rebellions or foreign wars, the Constitution pre-

serves all its vitality. In foreign contests, the United States government may do whatever the law of nations justifies.

In accordance with the views expressed by the United States Supreme Court and several other United States courts, and by the plain provisions of the Constitution itself, it is as competent for Congress to vest the judiciary with jurisdiction of land captures as of sea prizes. If, hitherto, it has not been done, it may have been for the reason that no occasion had arisen to render such legislation advisable. To the present hour, it may be safely asserted that no such jurisdiction, *jure belli*, has been given. But, because such jurisdiction, *jure belli*, has not been vested in the United States judicial tribunals, it by no means follows that jurisdiction has not been given over captured property used in aiding the rebellion; that, *municipally*, those courts have not been clothed with power to enforce forfeitures against property employed in violation of prohibitory statutes. Under the several embargo, non-intercourse, and slave-trade acts, the United States courts were authorized to proceed *in rem* against the *offending property*, and also personally against the *offending parties*. Those proceedings were by force of municipal sovereignty, which extends over, not only the territorial limits of the country, but over the vessels and crews belonging to the nation, on the high seas. The offences not being against the law of nations, were not cognizable, except under municipal statutes. Those statutes having given the necessary jurisdiction, the cases were adjudicated in the manner prescribed. If they fell on the admiralty and maritime side of the court, as its limits of authority have been judicially determined, they were heard in admiralty, otherwise as common-law or exchequer suits.—5 *Wh.*, 338; 8 *Cranch*, 155, 421; 5 *Cranch*, 304; 1 *Gall.*, 545, 295; 3 *Dall.*, 297; 2 *Cranch*, 406; 4 *Cranch*, 443; 3 *Dall.*, 6; *Wheaton's Elements*, 432, 157, 159, 405; 9 *Wh.*, 362; 10 *Wh.*, 66; 2 *Cranch*, 187; 4 *Cranch*, 241; 2 *Curtis*, 315; *Act of July* 6, 1812.

Some of them, as, for instance, the slave-trade acts, provide for the seizure or capture of both the offending persons and property, by armed vessels of the United States, and grant distributive shares of the property condemned, *as* in case of prize of war. The captures and condemnations are not, however, of prizes, *jure belli*, but municipal forfeitures. Such property is the "lawful subject of capture wherever found," by an American vessel, and if the acts had said "of prize" also, the terms employed would have been the same as those in the act of August 6, 1861. Because the offending persons were also punishable by indictment, the United States courts were not ousted of jurisdiction in suits for the penalties and forfeitures prescribed. By those acts, vessels which are being fitted out for that trade may be seized in port and forfeited, and the persons engaged in fitting them out punished by fine and imprisonment. The proceedings *in rem* for the forfeiture of the vessel, and also the prosecution

of the guilty persons, may be instituted at the same time and pursued separately to final judgment and execution. The proceedings would be on different sides of the court, but not incompatible with, nor dependent on, each other.

So the statute of August 6, 1861, which declares certain offending property "to be lawful subject of capture and prize wherever found, and that it shall be the duty of the President of the United States to cause the same to be seized, confiscated, and condemned," makes no strange or anomalous provisions. "Such prizes and captures shall be condemned in the district or circuit court of the United States having jurisdiction of the amount, or in admiralty in any district in which the same may be seized, or into which they may be taken and proceedings first instituted." The meaning is not obscure. If the seizure be on land, the trial must be by jury as in revenue cases on land; if on water, and within admiralty jurisdiction, then on the admiralty side of the courts. The seizure being *under* a law of the United States, would fall within the terms of the judiciary act giving jurisdiction to the United States district courts. According to the principles stated, libels of information, or informations framed under the act, and conforming to the rules of pleading governing cases of municipal forfeiture, would be the proper mode of commencing such suits. That mode was adopted in the first of the two cases now under consideration. But objection is made to the validity of those sections of the act of July 17, 1862, under which one of the counts of the libel of information is drafted. This leads to an important inquiry. The question is one not of international but of constitutional law.

The principle announced in Rose *vs.* Himley (4 *Cranch*, 241) and repeated in the following as well as other cases, viz: that during a war belligerent rights are *superadded* to those of the municipal sovereignty—a principle invoked by counsel and unquestionably correct, when properly understood—it is conceived has no application to the subject before the court. 6 *Cranch*, 281; 7 *Wh.*, 283; 3 *Wh.*, 246, 610; 4 *Wh.*, 52, 497; 14 *How.*, 38, 46; 6 *Wh.*, 191; 9 *How.*, 603–13. The same principle thus held correct in this country was announced in the *Immanuel*, 2 *Rob.*, 186; *The Manilla*, 1 *Edw. Ad.*, 1. Also in 3 *Hagg.*, 1; 16 *How.*, 164. It logically follows, from the doctrines already discussed, that every sovereign holds, so to speak, a two-fold relation to others. In his municipal or intra-territorial actions, he has the powers granted him or consistent with the internal or domestic constitution of his country, and no more. His subjects have a right to appeal to its restraining influence in all cases of its supposed violation. It is the bond of union between them and him, defining his rights and duties, and theirs also. Whether he is an absolute or limited sovereign, or merely the chief executive of a republic, is an internal or constitutional question. If other nations undertook to decide be-

tween him and his subjects, or the citizens of his country, whenever a dispute arose between them, either as to the true interpretation of their organic law, or as to their respective rights to alter or abolish the same, the country whose internal affairs were thus interfered with would cease to enjoy that equality and independence to which, under international law, as one of the family of nations, it is justly entitled. With that internal dispute other nations, as has been shown, have no right to interfere; it is beyond their cognizance; it is a municipal or household controversy into which others have no warrant to intrude. Hence they must remain strictly impartial and neutral; for if they decide it to be either rebellion or a just revolution, and thus throw into the scale the weight of their authority, they assume to dictate and adjust the internal conduct, disputes, and organization of other countries. The modern practice conforms not only to that rule, but to the example always set by the United States. The *fact* of the internal controversy may be recognized; and when it assumes belligerent proportions, third powers may treat it as a war; abstaining, however, from pronouncing on its justice or injustice, or from lending aid to either of the contending parties. The sovereign of that country, in the conduct of his foreign affairs, has, in the light of international law, as full belligerent powers and rights as any other sovereign. Every sovereign has, for purposes of municipal administration, municipal sovereignty, more or less limited by the domestic constitution of his country; and, at the same time, for purposes of foreign or international intercourse, as full and complete rights, peaceful and belligerent, as the most absolute sovereign in the family of nations. It may be that different portions of internal sovereignty are vested in different persons, or that the powers of municipal and extra-territorial administration are lodged in different hands. But such questions of domestic organization do not affect the principle. Under the American theory the United States Government is just what its Constitution declares it to be; it has no other being or existence whatever. It is vested by the people with certain and definite powers, and those are distributed among coördinate departments. It is *supreme*, within its prescribed sphere, over the people of the whole land; beyond its sphere it is a legal non-entity—destitute of all power and rightful authority or legal existence. It cannot transcend the powers with which it is clothed, or violate its organic law, which is just as much the law of its life as to the human being are the vital laws of his organism. The internal arrangements of sovereign powers are purely municipal questions. It is enough for foreign nations to know concerning them, that the United States Government is vested with full war power, and with the exclusive management of all foreign or extra-territorial affairs. Hence, as to all foreign nations, it may exercise the fullest rights of belligerency when

occasion requires. Those rights are not, accurately speaking, *superadded* by war, for they existed before. War only calls them into potential activity. In peace they lie unused or dormant.

In deciding, therefore, questions of internal or constitutional law, no aid can be had from the law of nations, except in interpreting terms employed. No constitutional *power* is derived from that source; nor does the law of nations define, nor can it, what the municipal organization of each or any nation shall be. By the Constitution of the United States Congress has power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." As has been judicially settled, and as the foregoing principles suggest, that power in foreign wars is limited only by the rules of modern civilized warfare. *Justice Story's Opinion in Brown* vs. *United States*, 8 *Cranch*, 110; *The Venus*, 8 *Cranch*, 253.

It has power also to define and punish offences against the law of nations; but in its exercise of that power it can enforce its own statutes only upon American citizens on the high seas or extra-territorially, and upon all persons intra-territorially. It has power also to provide for calling forth the militia to execute the laws of the Union, "*suppress insurrections*, and repel invasions," "to raise and support armies, and provide and maintain a navy." No one has contended that under those or any other granted powers, the United States Government derives authority, whilst repelling an *invasion*, to disregard all the prohibitions contained in the Constitution—that, by force of the necessity springing from such invasion, it is at liberty to transcend all limits upon its intra-territorial or municipal control over the lives, liberties, and property of its own citizens. The Constitution, as has been decided, does not extend over foreign conquests, as such, *eo instante*, (9 *How.*, 603;) and therefore the laws of war alone govern the military operations of the Government the moment our armies pass beyond our territorial jurisdiction. So long as the army is within that jurisdiction it is amenable to all constitutional requirements, and each soldier and officer is bound to obey the civil as well as military laws. It is not necessary, in searching for a general principle, to note every exceptional case that may arise—such as martial law, &c.—but merely to ascertain whether, because, extra-territorially, the laws of nations govern, they must therefore be the only obligatory rules of action, intra-territorially, despite the internal constitution and laws. To pursue this inquiry in all its length and breadth would require a treatise. It is sufficient for the present purpose to say, that intra-territorially the Constitution is *supreme* over all statutes, compacts, ordinances, orders, or decrees. It is not only the *supreme* law, but that which the people, in their sovereign capacity, have proclaimed their safety requires.

"The safety of the people, which is the supreme law," is involved in

the maintenance of that supreme law—the United States Constitution; whatever is in conflict with it is void, assailing, in the highest sense known to reason or law, "the safety of the people," for whose happiness that Government was instituted and Constitution ordained. As the people have thus decided what is the supreme law which their safety demands, there can be no other law, in a human sense, higher or more obligatory. Full constitutional powers exist to carry on foreign wars according to the laws of nations. That is its sole limit. Among the family of nations this country is the equal of every other, and knows no superior except the laws common to the whole family. Whilst the Government is confined within constitutional limits, in all its dealings with its own citizens, it is not so confined as to be cognizable by foreign nations in its extra-territorial operations with others.

An insurrection presupposes that the laws of the country cannot be enforced through ordinary tribunals by ordinary process. Hence the necessity of resorting to force, to overcome the obstacles and resistance interposed. The object in view is the removal of those obstacles, the overcoming of the resistance, and the reinstatement of the civil tribunals in their wonted vigor. Obedience to the Constitution and laws must be exacted from each and all. "*Legum, idcirco, omnes servi sumus ut liberi esse possimus.*" The use of military force in wars is not, as was justly said in the argument, to punish or to avenge. The punishment of the civil and criminal offences committed by the insurrectionists is the office of civil authority; the military forces have military jurisdiction alone. They treat prisoners captured, merely as "prisoners of war," and not as "traitors." They act with reference to property as military movements at the time may urgently require; but theirs is not the constitutional function to try offences, and enforce penalties and forfeitures, as such. Hence the distinction must always be observed between military power acting on the one hand in a district of country conquered from a *foreign* foe, where it has no law, but the law of nations, common to it and the subjects of its foreign enemy, who for the time being are under the new and military dominion, and military power on the other hand *at home*, where the obligatory laws, and the only ones common to all, are the Constitution and municipal codes. Therefore, military operations against an insurrection should be conducted according to the rules of modern civilized warfare, and also within constitutional limitations. It is a narrow view of the Constitution to hold that it is unequal to the work of self-preservation against all forms of opposition—that its powers are not, when rightfully construed and applied, equal to every emergency, even to that in which it has been involved by this criminal rebellion. If it is not, whence does any one derive legitimate authority beyond or against its *supreme* obligatory force? Who has any legitimate authority *beyond*

its sanction? It may, therefore, be correctly stated, as urged in argument, that all military operations for the "suppression of insurrection," should be limited both by the rules of modern civilized warfare and the provisions of the United States Constitution—or, to be more accurate, by the provisions of the United States Constitution alone. The fact that naval or land forces seized the property and caused it to be brought in for adjudication, does not make the cases turn upon mere military authority for rules of decision. If the seizure were by private and uncommissioned persons, the status of the property itself would not be changed. Government may, either under the law of nations or municipal law, adopt the individual act. The question as to the right to seize is one between the Government and the seizor alone, and the claimant cannot interpose that objection. If the government can authorize a seizure, it can determine exclusively whom it will entrust with that duty. Under a government of law, if that duty is confined expressly and exclusively to particular persons, and others seize, whereby a trespass has been committed by them, the title to the property itself is not changed thereby. So, in proceeding for a forfeiture *in rem*, if the property was seized by any one and has come in *custodia legis*, the sole primary question is as to the status of the property, whether it is lawfully forfeited or not. Where a distributive share of the proceeds is granted to official or commissioned captors, the uncommissioned receive nothing. As to seizures by private persons, see 10 *Wh.*, 306; 1 *Gall.*, 563; 3 *Wh.*, 246, 310; 2 *Wh.*, 76; 6 *Wh.*, 1; 4 *Wh.*, 100; 8 *Pet.*, 495; 16 *Pet.*, 342.

It is an error to suppose, as was shown in several cases decided in this court last year, that a citizen has not authority to arrest, *flagrante delicto*, either offending property or persons, or that a soldier is deprived of or exonerated from that duty, except so far as military discipline may enjoin. Indeed, the analogies between military and civil action are closer than is often supposed.

The object of a battle is to capture the foe, and all the force necessary is used for that purpose. When captured, the prisoners cannot lawfully be maltreated or deprived of life. This rule, *flagrante bello*, is like the common-law rule, *flagrante delicto*. A commissioned civil officer authorized to arrest—or indeed any one, who witnesses the offence—has the legal right to use the force necessary therefor, but when the capture or arrest is made, the prisoner is not to be punished or abused by his *captor*. An army holds the captured foes merely as prisoners of war; but the appropriate judicial tribunals can alone decide upon any civil offence committed, and inflict the punishment therefor.

It has been held by *Justice Nelson*, and by *Judges Dunlap*, *Cadwallader*, *Betts*, and *Sprague*, since this war commenced, that, under the Constitution and laws of the United States, property found "adherent to the

rebels" is to be treated as *rebel* property, just as in foreign wars such property is pronounced, *jure belli, quasi* enemy property.

The forfeitures imposed by the act of August 6, 1861, are for a violation of *municipal* laws, just as in revenue cases smuggled goods are seized and condemned. The offending *property* is confiscated. Many revenue acts impose no personal penalty on the offending party, but pursue the *property, in rem.* Other revenue cases have imposed forfeiture on the *res,* and also fines and imprisonment on the *person.* In such cases there are different modes of trial necesary under the Constitution—as indictment, trial by jury, &c.—before inflicting the *personal* punishment, and, it may be, before imposing the *fine;* and actions of debt for the prescribed penalties in money, informations *in rem* against the property, &c. The true line of distinction in such statutes is commented upon in the following cases: United States *vs.* 1960 Bags of Coffee, 8 *Cranch,* 405; Schooner Rapid, 1 *Gall.,* 295; The Dickenson, *Marriott's Dec.,* 1; The Recovery, 6 *Rob.,* 348; King *vs.* Whittaker, 1 *Hagg.,* 145; Anonymous, 1 *Gall.,* 24; Ketland *vs.* The Cassius, 2 *Dall.,* 365; 3 *Dall.,* 297; 2 *Cranch,* 406; 4 *Cranch,* 443; 2 *Rob. Ad.,* 245; 2 *Wash. C. C. Rep.,* 522; 1 *Gall.,* 3, 177; 2 *Gall.,* 4, 306; *Pet. C. C. Rep.,* 10; 1 *Mason,* 88; 2 *Gall.,* 552, 522, 210.

To the two-fold capacity of the Government, already stated, reference must be had in adjudications on this class of questions, in order to apply correct rules of decision. In suppressing *insurrection* the object is to enforce municipal sovereignty over all subject thereto. If, in the exercise of municipal authority, the rights of neutrals or of neutral nations become involved, international law must be appealed to, in the adjustment of such controversies; for that is the only system of jurisprudence to which neutrals are amenable, unless found within our territorial jurisdiction. If the property seized be *American,* it will be judged according to our municipal code; if it be *foreign,* by the law of nations. Here is no *superadding* of belligerent rights; for they always existed. The occasion does not confer any new *power,* but merely calls for the exercise of an admitted right. This is true with respect to every department of jurisprudence. When facts call for the application of equity or common-law rules, the courts proceed as the facts demand. No new *power* is given, but merely an application made of a preëxistent power. There is great danger of being misled, therefore, in supposing that war either *superadds* or *grants* new powers to a government. Grants of governmental authority can be made in no such way. A foreign foe by commencing a war or invasion against the United States, does not change the United States Constitution. No department can receive from the acts of an enemy new constitutional authority. To hold otherwise, would be to make the internal laws of the country, and even its organic law, not the sport of mere chance alone, but the plaything of foreign

caprice. The lives, liberties, and property of American citizens would not rest for protection, intra-territorially, upon constitutional safeguards, but upon the arbitrary will of foreign nations. If the fact of invasion overthrows, *ipso facto*, and of its own intrinsic force, the Constitution of the United States, then American liberty has no assurance of safety for an hour; our written Constitution has no solid or stable foundations on which to rest. And still worse would the case be when insurrection occurs. If that act of overt hostility to the Constitution *overthrows* it, then every insurrection against it becomes a success, necessarily, no matter what the result of battles may be. Still, that absurdity is the necessary consequence of the doctrine, that the Government receives new, or extra-constitutional, or unconstitutional powers from the existence of war, of any kind. At the very moment it is assailed, and when its chosen officers are required most vigorously to defend it against assault, it would vanish—disappear—pass out of existence! Can any proposition be more illogical or erroneous? In vindicating constitutional power against armed treason, it must be steadily and faithfully held to be *supreme*. All legitimate power and rightful authority depend thereon. The moment its defenders desert it, the citadel is lost; and the insurrection works a revolution, in which not only constitutional supremacy, but the Constitution itself, is engulfed. If those entrusted with the administration of affairs have any powers *not* granted, how do they obtain them? From the people? By what organic act of the people is such a new grant evidenced? Is it from the rebels or the invading foe? How do they acquire the right to remodel or abolish the internal organization of a country before they conquer it? Their dominion depends on conquest alone. In no other way have they any power to delegate. If, then, neither the people nor rebels have conferred *extra-constitutional* powers upon an officer of the country, how can the latter procure such powers? Outside of his commission he is no officer at all—he has no more authority than a private citizen. He is *officially* a mere agent, with just so much authority to act for the principal as has been delegated to him. And no action beyond the limits of his agency binds the principal at all. This is true of all officers of the Government.

Acts of Congress without constitutional sanction, judgments of courts beyond their jurisdiction, and acts of the President without legal authority, have always been pronounced *void;* they are, in the nature of things, void. Any other hypothesis would convert all limited agencies into absolute control over the principal's rights, and make of constitutional governments absolute despotisms, or, what is far worse, would make *every* public officer, in every department of the Government, an uncontrolled and uncontrollable tyrant—a social and legal chaos. Each judicial, min-

isterial, or legislative officer, no matter how humble or exalted his sphere of duty, would be not only without restraint, but clothed with absolute prerogatives. To such extreme follies would such doctrines lead.

The powers of each department of the Government, and of every individual officer under it, are fixed and certain. He cannot transcend them and do an official or obligatory act. The chief justice cannot assume the functions of commander-in-chief, and direct armies in the field. Such an act would be simple usurpation. Nor, on the other hand, can the President constitute himself the law-making or judicial department of the Government, or exercise the functions of either of them. This is equally true in war and in peace. The Constitution is not ambulatory or evanescent, shifting from one place to another, or vanishing and reappearing, as the whims or passions of individuals, whether hostile or friendly, may dictate.

But, under the belligerent powers granted to the Government, it may exercise, on all proper occasions, and at all appropriate times, every belligerent right deemed advisable. And it often happens that, at the same period of time, it must exercise both intra-territorial and extra-territorial powers, the one upon its own citizens, the other upon neutrals and upon adverse belligerents. Hence, in the present contest, so far as foreign nations are concerned, the United States is a belligerent power, and exercising belligerent rights. From that fact springs the right to seize the contraband property of other nations on the high seas, and condemn it as *prize of war*. Upon those subject to its municipal sovereignty it exercises municipal jurisdiction; upon others, international. Hence in the various cases of capture upon the high seas, the rules of decision will vary according to the foregoing rules. If an American vessel is seized for the violation of an act of Congress, it should be proceeded against *municipally;* if a foreign vessel is seized beyond our territorial jurisdiction, it can be judged only in accordance with the law of nations, for neither territorially nor otherwise is it subject to our municipal regulations. This distinction may not have been observed in all cases, because the attention of courts was not called thereto, by jurisdictional or other exceptions; but it is nevertheless true and universally applicable. The case of *Slocum* and *Wheeler*, and other adjudications to the same effect, maintain the principle. Often it is of serious import; for if the decree happens to be made when the court has no jurisdiction, it will not be respected by other tribunals, and almost endless litigation will ensue. A kindred error has been presented in the argument, and results also from confounding the intra-territorial and extra-territorial powers of the Government. If it be conceded, *argumenti gratia*, that under the laws of nations a belligerent has a right to capture or destroy all the public and private property of the enemy nation, wherever found, on sea or land, it

by no means follows that he can apply those rules of *foreign* conquest to domestic wars. That proposition, extra-territorially, depends upon the law of nations. The internal constitution of a country does not necessarily extend, *eo instante*, over every portion of the enemy country subjected to the temporary military dominion of the former. In Great Britain that rule is held to be the result of the British constitution, (*The Foltina*, 1 *Dods.*, 452,) but in the United States the opposite is held to be true. The distinction is illustrated by the United States Supreme Court in the following cases: *Fleming* vs. *Page*, 9 *How.*, 603; *Cross* vs. *Harrison*, 16 *How.*, 164.

A large portion of the American Union, all of which is *de jure* subject to the United States Constitution, is, at the present time, under the actual control or dominion of insurrectionists. In conducting military operations to expel or subdue that usurped insurrectionary dominion, and assert successfully the lawful supremacy of the United States Constitution and laws there, it must be constantly remembered that the supremacy thereof, *rightfully*, or in contemplation of law, is still over that insurrectionary region. The moment the false is overthrown, the true resumes its rightful sway.

The disturbing cause is removed, but no new disturbing cause or usurpation can rightfully take the place of the former wrongful dominion. The *de jure* has become also the *de facto* authority. The usurper has been expelled, and the rightful sovereign restored. Judge Sprague, in "*The Amy and her cargo*," recently held, in accordance with immutable principles, that no sovereign can acquire the rights of a conqueror over his own lawful dominions. He owes protection to all of his subjects, and if, in consequence of his own weakness, he so far fails to give to them the needed protection for a time, as to suffer them to pass under the dominion of a foreign or domestic foe, his own fault or misfortune does not entitle him, on recovering his former sway, to impose upon them, as his subjects, any other burthens than his rightful office justifies. In brief, he has regained his former jurisdiction and dominion, nothing more. Especially is this true with constitutional governments. How can the Government of the United States rightfully abdicate or abandon any of its duties under the Constitution, in any part of the country? For a time its legitimate authority may be successfully defied, yet it is legally bound to suppress the insurrection, and restore its lawful supremacy, with all the constitutional safeguards, privileges, and rights temporarily overthrown by the usurpers. It cannot exercise the belligerent rights of a foreign conqueror over any portion of the country subject to the Constitution and laws. That Constitution and those laws were *supreme* there, all the time *de jure*, and have at last become so *de facto*. It is still, however, an internal, and not an international, question.

So long as the insurrectionary organization is treated as rebellious, instead of being recognized as an independent government, so long the Constitution, and not international law, must be the rule of action. The moment the rebels are admitted to be technical "enemies," and the country under their dominion "enemy country," that moment they become, by virtue of the admission, a power independent of the United States. None of the United States laws will longer be obligatory upon them. They will not be amenable to the United States laws for the punishment of treason, or any other municipal offence. Until such recognition, their usurped dominion is merely insurrectionary, and the country they hold is not in law an enemy country; nor can the rules of international law applicable to enemy's country obtain over it. Hence, when Congress passes acts, within its constitutional powers, declaring certain violations of United States law criminal or causes of forfeiture, and prescribes certain modes of enforcing them, which modes are borrowed from known doctrines or practices under the laws of nations, such modes become *municipal*, and reference is to be had to the laws of nations for rules of *interpretation* merely, and not for the sources of Congressional authority. The right to punish is still a municipal right, and is to be pursued as such.

In plain terms, it is not an enemy country, and none of the international doctrines with reference to such a country, have any application to the case. By proper attention to this principle, much confusion will be avoided. The doctrine here stated has been forcibly expressed by Rutherforth in his Institutes:

"The act of the people, however injurious it may be, will not increase the power of the sovereign, or will not give him a right to any more power than the constitution has given him; for the sovereign power was originally vested in the collective body of the society, *called the people.* The sovereign cannot, of right, claim any greater part of it than the people have granted to him by compact in forming the constitution. When the people violate the compact on their side, it is voidable at the sovereign's discretion. If he chooses to abide by it, he has no right to any other power than he derives from it, and if he chooses to make it void, instead of gaining a greater part of the supreme power, he will lose what he has, and it will, as in other cases, revert to the people. Thus the people may claim to change the constitution when the sovereign invades their part of the power, whereas he can only claim to *continue* the constitution, though the people should causelessly and wrongfully invade his part. This is the whole of his right, and no event whatever can give him a more extensive right without the consent of the people. If the struggle between him and them should end in civil war, and victory should declare on his side, yet conquest will not of right increase his power, however strongly we may put the case in his favor by supposing the breach of the constitution to have begun from the people, and the whole blame of the war rests on them. For the use of force, though it should be superior to the force opposed to it, only serves to support a

right which might otherwise have been hindered from taking effect; it does not produce a right where there was none before."

A wrong view of the foregoing elemental principles, coupled with an entire ignoring of the American constitutional theory, has been used by the insurrectionists in their vain attempts to justify their rebellion. The United States Government is not like a sovereign in the foregoing view, one party to a compact and the people the other party; much less fractional portions of the people. That Government is the *agent* of the people, clothed with delegated powers to a limited extent, and charged with specific duties. It can enter into no compacts with the people whereby a bargain is to be struck between them, as if they were independent contracting parties. The people of the whole Union, and of all the States, *ordained* a Constitution which is the supreme law for all. They provided a mode of amending the same. If the required assent is obtained in the form ordained, then the amendment is valid. But the minority resident in no part of the country have a right, either with or without the consent of the Government, to violate the ordained will of all. Even on the theory of a compact, *each* State and each citizen is not an independent party thereto, with a right to judge for himself when the compact is violated, and to avoid it. The whole people of the States constitute the contracting parties, *inter sese*, and agreed that a constitutional majority should alone amend their organic laws, or abolish the same. How, then, could a small minority, either of States or of the people, assume, on any conceivable theory—even of a compact—to declare the Constitution no longer obligatory upon them?

But, in the true sense of Rutherforth's proposition, it is just and sound. The government, by a successful vindication, whether peaceably or forcibly, of the rightful supremacy of its constitutional authority, does not and cannot acquire rightful unconstitutional authority. A suppressed wrong gives no right to commit a like wrong. A triumphant vindication of the right does not abolish or annihilate the right vindicated. But the United States Constitution does not belong to *one* part of the people alone. It is the common patrimony of *all*—their palladium of life, liberty, and property. Any lawless change or violation of it is a wrong upon all. The successful or unsuccessful refusal of a part of the people to obey its requirements, or share in its blessings, cannot justly deprive the others of their right to its beneficent provisions. The loyal are to be as much injured by the overthrow of its safeguards as the disloyal. Such an assault upon it would be a double wrong to its friends. They have never sought to throw it off, but have loyally clung to it, and with filial devotion. They have a right to demand that it shall remain intact as their supreme law.—*Wh. Elements*, 616; *Amy and Cargo, Law Rep., June*, 1862.

The doctrine of "superadded" belligerent rights, then, does not justify or excuse unconstitutional action in the internal administration of affairs. The language of the United States Supreme Court carefully observes the distinction contended for. "It is not," said Chief Justice Marshall, "intended to say that belligerent rights may not be superadded to those of sovereignty. But admitting a sovereign, who is endeavoring to reduce his subjects to obedience, to possess both sovereign and belligerent rights, and to be capable of acting in either character, the manner in which he acts must determine the character of the act. If, as a legislator, he publishes a law ordaining punishment for certain offences, which law is to be applied by courts, the nature of the law and of the proceedings under it, will decide whether it is an exercise of belligerent rights, or exclusively of sovereign power; and whether the court, in applying this law to particular cases, acts as a prize court or as a court enforcing municipal regulations."

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[Here is omitted the discussion of another legal question, not applicable to the main propositions.—9 *p.*]

"No. 639" is a libel of information. It sets out a cause of forfeiture very fully under the act of August 6, 1861, describing the persons who sold the property for rebel use, in violation of that act, as "persons unknown," &c. As that act is valid, the mode of procedure lawful, and the pleading proper, with perhaps some surplusage, the exceptions to so much of the libel are not well taken. The seizure having been described as made on land, the pleading, perhaps, would have been more technically accurate if it had been styled an "information." At the trial the parties will, of course, be entitled to a jury, as the case is not of admiralty and maritime jurisdiction, under the principles already announced.

The libel contains another count, or articulation, purporting to be under the act of July 17, 1862. One objection is, that said libel nowhere avers that this is the district into which the said property was *first* brought. The language of the act is: "Proceedings *in rem* shall be instituted in the name of the United States in any district court thereof * * within which the property above described, or any part thereof, may be found, or into which the same, if movable, may be first brought." The wording of the act is not so clear as it might have been. Although it appears from the libel that the property was found literally in this district *court*, in contemplation of law, (for it was, when this libel was filed, and it is so averred, in the custody of the marshal under a previous warrant issued upon an instance libel,) yet it is evident that it was not the intention of the pleader to make that averment, save in conformity with a rule of this court, adopted to prevent the multiplication of warrants of arrest *in rem*, when the property is already in custody. The act, of course, means that the

district court of the district within which, &c., (the district, and not the *court*, within which the property may be found,) shall have cognizance of the case where *real estate* is proceeded against; for the next clause says, "or into which the same, if *movable*, may first be brought."

The property in question is *movable;* yet so far is the libel from averring this to be the district into which it was first brought, that it distinctly mentions two or more districts into which it was taken after seizure and before it was brought here. It will be observed that the act does not say from what place brought, or after what time. It may mean after seizure, or subsequent to the expiration of the period contemplated by the sixth section. But that point is passed until it shall become necessary to decide it; for it is not free from difficulty, inasmuch as it may be that such property will, in some cases, be *found* in the district, and in others be *brought* into it, &c.

As the libel fails to make the necessary jurisdictional averment for a proceeding in this court under that act, and even states the case out of court, the exceptions, so far as they relate to that supposed cause of forfeiture, will be sustained. Proceedings under the act of August 6, 1861, may or may not fall within the admiralty jurisdiction of the court; and if they should do so, and the act of March 25, 1862, be applicable thereto, a different course of proceedings will have to be taken from that to be followed under said act of July 17. It is possible that the true construction of said last-named act will cause all, or nearly all, cases under it to fall on the common-law side of the court, involving trials by jury, &c., which would be a wholly different mode of adjudication from the course in admiralty. Hence it is proper to keep the proceedings wholly separate—not to attempt to blend them in one action. The views of Justice Story and of Sir Wm. Scott, as quoted in an early part of this opinion, concerning similar practice in prize and instance cases, respectively, are applicable here.

The act of March 25, 1862, makes provision for various proceedings, peculiar to prize cases. If it be held to apply to *all seizures* under the acts of July 13, 1861, and of May 20, 1862, and also under the acts of August 6, 1861, and of July 17, 1862, then prize commissioners will have to take possession of all such property, in the first instance, and do all that is therein prescribed. It is not known what has been the course of proceedings under those statutes in other district courts; but in this district all such cases have been considered, technically, as municipal and not prize cases, and therefore not requiring the intervention, expense, and delay of prize commissioners. As none of those cases, thus far, has been heard on the prize side, *jure belli*, and as in the opinion of this court none can be so heard, unless neutral rights on the high seas shall arise, (which is hardly probable here, so far inland,) it seems that the statute

in question can hardly apply. The language of the act seems to contemplate only such cases as involve prize proceedings, *jure belli*, and those which follow like proceedings. It says "all *maritime* captures, and captures and seizures made under the slave-trade acts." The last class of cases, it is known, though prizes of forfeiture under the *statutes*, instead of *jure belli*, are generally adjudicated according to the modes universal in prize cases *of war*. Hence the phrase "*maritime captures*" should receive a like construction, and be held to include only such cases as require prize commissioners. The captors under the slave-trade acts receive a distributive share of the fund, by virtue of the municipal grant; and such captures are made on the high seas, or in American ports, by force of Congressional or municipal statutes. The authority to act being municipal, not international, so far as the proceedings adopt any of the modes known to technical prize tribunals, they are not by force of extra-territorial but of municipal law. The court, in adjudicating upon them, is a municipal tribunal. Hence such "*maritime* captures" must conform to that statute. It should be noticed that the act itself seems to recognize a distinction between "captures" and "seizures"—"to all *captures* and *seizures* made under the laws for the abolition of the slave trade." A capture has been judicially defined to be "the taking by military force." A seizure has been generally considered the taking by a civil officer. If the seizure be on water, it falls within admiralty and maritime cognizance; if on land, within common-law jurisdiction.

The word *maritime*, as used in the Constitution and judiciary act, was designed to remove all doubts as to instance jurisdiction over seizures of property water-borne, *infra corpus comitatus*, under revenue and other prohibitory statutes. There may be captures on land, *jure belli*, as of *booty;* and if jurisdiction thereof is vested by Congress in United States courts, then those courts will proceed, constitutionally, as *prize courts* of war, but not as admiralty courts; for it has already been shown that such courts never had jurisdiction in *admiralty* of land captures. Such land captures, not being maritime, could not be made to fall within the maritime jurisdiction vested by the Constitution in the judicial department. Hence, captures on land, like the cases now before the court, are certainly not within the provisions of the act of March 25, 1862. If they had been, the question would have arisen, whether the property, being already in the custody of the marshal under a previous warrant of arrest, could have been taken even temporarily out of his custody, and placed under the control of prize commissioners? The difficulties springing therefrom would indicate an irregularity of practice, such as has been already adverted to. This remark applies with equal force to the libel in case "No. 940."

It is said, the act (of August 6) does not include the *public* property

of the rebels, or of the so-called Confederate Government. From the rules concerning *booty* and naval captures heretofore laid down, it is evident that whatever doubt may exist as to the confiscability, *jure belli*, of *private* enemy property on land, none has ever obtained concerning the *public* property of the enemy, with the exception of *res sacræ*, &c. But as this is a municipal law, and is in conflict with no rule known to the law of nations, but was evidently designed to subject to capture and forfeiture all property which is actually being used for hostile purposes, or which is about to be so used, it is not perceived by what mode of construction its terms can be restricted to such property as has not actually been transferred to the rebel government or become a part of its army supplies. If it had been already sent to the rebel army and was captured from its camps, it would at once, under the articles of war, if of the description therein named, be held by the capturing army for direct governmental use, and, it may be, require no judicial condemnation. The rules discussed in *Goss* vs. *Withers* and in *Cook* vs. *Howard* would be applicable. And it is apprehended that Judge Betts held correctly in a recent case, where application was made for delivery of captured property to the claimant under appraisement, that such delivery is a matter, neither of *course*, nor of *right;* certainly, *jure belli*, no such principle is known, nor could it be tolerated. Otherwise, the claimant, who might, on adjudication or hearing, prove to be an alien enemy, would receive possession of the very contraband property which it was the object of the law to keep from falling into hostile hands.

A similar construction has been put upon the statute concerning revenue seizures under the acts of July 13, 1861, and of May 20, 1862. It is a matter of judicial discretion whether such delivery *pendente lite* will be ordered. The act of March 3, 1847, does not govern in such cases; for, by the terms of those statutes, (of July 13 and May 20,) proceedings under them are to be according to the act of 1799, which provides that "upon the prayer of the claimant, &c., *it shall be lawful for the court*" to appoint appraisers, &c. Hence the court, or the judge by the amendatory statute of April 5, 1832, must determine in each case whether appraisers shall be appointed or the prayer granted.—*Brig Struggle*, 1 *Gall.*, 476.

The language, as well as the whole scope, of the act of August 6, 1861, is broad enough to cover the *public* property of the rebel armies and rebel government. The property named is, that "acquired, &c., with intent to use or employ the same, or suffer the same to be used or employed, in aiding, abetting, or promoting such insurrection," &c., and "all property" so used with the knowledge or consent of the owner. If the property has already passed into the possession of a rebel army, or of the rebel government, or of its agents, it is *prima facie* in such possession

for rebel use. The claimant will have to rebut the *prima facie* case made by the fact of such rebel possession.

The minor objections made in the argument, dependent on the phraseology of the acts of August 6, 1861, and of July 17, 1862, it is not necessary to consider in detail. They are covered by the rules for pleading under similar statutes, laid down by the United States Supreme Court in the following cases:

The Caroline *vs.* United States, 7 Cranch, 496.
Schooner Hoppet *vs.* United States, 7 Cranch, 389.
The Samuel, 1 Wheaton, 9.
The Palmyra, 12 Wheaton, 1.
The Merino, &c., 9 Wheaton, 391.
The Mary Ann, 8 Wheaton, 380.

The *first* and *second* and *fourth* exceptions to the libel in "No. 939" will, therefore, be overruled, and the *third* exception sustained. The exceptions overruled refer to so much of the libel as is framed under said act of August 6, and the exception sustained to so much of said libel as is under said act of July 17.

The libel in "No. 940" is framed under no statute whatever. It is based on the theory that all property taken from rebels in arms, on land or water, within insurrectionary districts, is lawful *prize of war*, and may be captured, brought in, and condemned as such, without any act of Congress therefor. The averment is, that the same was captured by a commissioned officer in the United States army, and the forces under his command; and also that certain vessels which *transported* him and his forces to the point where they disembarked, co-operated in said capture. If the design of the pleader was to bring the case within the rules governing a joint land and naval capture, other allegations than those made by him would be necessary. The coöperation in such cases must be *actual;* that is, at the time of the capture actually made; the two forces must have been operating together for the same purpose, and with reference to the particular capture. Whether the same rules as apply to joint naval captures would govern in all respects, it is unnecessary to discuss.

Stella del Norte, 5 Rob., 349.
The Dordrecht, 2 Rob., 55; 3 Phill., 499.
The Invincible, 2 Gall., 42.
8 Cranch, 189, 368.
7 Wheaton, 355.
2 Wheaton, App. 58.

It is not necessary to aver, even in joint *naval* captures, that the different vessels were duly commissioned, and departed from the same port, to cruise against and capture all enemy property on the high seas, &c.,

and that whilst they were so employed, one of said vessels encountered and captured the enemy vessel in question. The disputed rule about being in *sight* at the moment of capture is a dispute which relates solely to the distribution of prize money, and which, under the act of March 25, 1862, can no longer exist in American courts. But, in this libel, the language seems to contradict the hypothesis that the vessels were in sight at the time of the capture; for it alleges that the land forces embarked at Helena, in Arkansas, on said vessels, "for the purpose of going on a scouting expedition or reconnaissance" into Mississippi; that they did disembark in the latter State, and "penetrated into the country;" that "while so employed they discovered, and by force of arms," captured from rebels in arms the property in question, &c., &c. The next distinct allegation is very general in its terms: to the effect that the land forces were greatly aided by the vessels that they embarked upon, and were *transported* by the latter to the place of debarkation, near the place of said capture; "at or near which place the said vessels, their officers and crews, coöperated with said troops in making said capture," &c., &c. Whether the allegation that the troops "penetrated into the country," and there "discovered" the rebels in arms from whom they made the capture, is consistent or not with the other allegations, it is not important to consider. In prize proceedings the *general* allegation of capture as prize of war is sufficient, and the question of "prize or no prize" is the primary one to be adjudicated. The averments which relate to the *mode* of capture can affect only the distribution of the proceeds, and if the property be held "lawful prize," the claimants cannot be heard upon the other point; for they have no interest therein. The opinion of Justice Story, in *The Invincible*, (2 *Gall.*, 42,) is very full and conclusive as to the allegations of joint capture in this case. It must be borne in mind that *transports* do not share in captures; for they are not naval forces—are not *commissioned* for naval enterprizes; and, therefore, even when there is a conjunct expedition for land captures, they are treated as no part of the capturing fleet.

The Cape of Good Hope, 2 Rob., 282.

The Dordrecht, 2 Rob., 57.

The British Guiana, 2 Dod., 151.

The Stella del Norte, 5 Rob., 350.

Claimants cannot be heard to dispute whether the captors were duly commissioned or empowered to make the capture. The Government alone can raise that question; for it alone must determine whether it will adopt a seizure made by a private citizen, or leave him to be treated as a trespasser; in other words, whether it will ratify an act done in its name by an uncommissioned party or not. If it affirms the act, then it becomes an act of the sovereign, who has the full belligerent

right to make all lawful captures, *jure belli*, from the enemy. The privato captors in such cases receive no share of the proceeds.

The Amiable Isabella, 6 Wh., 1.

The Dos Hermanos, 2 Wh., 76.

A similar rule obtains with regard to municipal seizures.

Wood *vs.* The United States, 16 Pet., 342.

Gelston *vs.* Hoyt, 3 Wh., 246.

Taylor *vs.* The United States, 3 How., 197.

The Caledonian, 4 Wh., 100.

Carrington *vs.* Merchants' Insurance Co., 8 Pet., 495.

As the averments concerning coöperation on the part of the vessels named were not made by the pleader for the purpose of raising a question as to prize money, but (as is stated) merely to show that this was either a land capture by land forces alone, or a naval capture with the assistance of land forces—a conjunct enterprize, so as to present to the court the two questions separately: First, as to land captures by land forces; and, secondly, as to captures on land by naval forces, either singly, or conjointly with land forces—the details to which reference is made, become unimportant in this stage of the inquiry. The main proposition has already been considered, in the light of authority, whether under the law of nations private property on land is subject to capture as lawful prize, either by land or naval forces, or by both in actual cooperation, and, also, the limits of naval authority both as to places and kinds of property. No decision is pronounced on any one of those propositions; nor does it become necessary in these cases.

It may be sufficient to remark, that if private enemy property on land is confiscable, *jure belli*, then it is competent for a belligerent sovereign to commission either land or naval forces to capture the same as prize of war; and it possibly may hold good, that the capture of such property by private persons may be affirmed and adopted by the sovereign, just as in captures on the high seas, or in municipal seizures. The question which would thus be presented, would be one solely between the sovereign and his subject. And, further, the dicta expressed in the dissenting opinion by Justice Story, in *Brown* vs. *The United States*, and in his opinion on the circuit bench in the original case, reported in 1 *Gall.*, 563, (The Emulous,) may be correct, viz: "The power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water," are broad enough to cover, *jure belli*, all movable property and choses in action belonging to the subjects of the adverse belligerent; and the word *reprisal* covers the capture or destruction of every description of enemy property, public or private. If that be correct, notwithstanding the conceded fact that modern usages of war are directly to the contrary, as well as the weight of modern authority and

the whole of American diplomacy, yet as that power, if it exists, was decided by the United States Supreme Court, in *Brown* vs. *The United States*, to be vested exclusively in Congress, until it passes an act therefor no such belligerent right during a foreign war can be exercised or authorized by the President, or any officer of the army or navy of the United States. Therefore, whether courts are to consider the present contest as *war* in the fullest sense of the term, or in the more restricted sense of the use of military force to suppress an insurrection or a treasonable outbreak; whether as a public, or domestic or civil war; still, in the absence of an act of Congress authorizing such sweeping and universal *reprisals*, they cannot be lawfully made. Indeed, it is well known that Congress has not yet authorized commissions of any kind to be issued to privateers against rebel property afloat on the high seas; and that its whole legislation, since the insurrection commenced, has been based upon the theory that the rebels have not belligerent rights, *jure belli*, but are still subject to the municipal sovereignty of the United States Constitution and laws. Hence the statutes of treason, conspiracy, and general confiscation. A paper capture, like a paper blockade, has no legal existence—is a mere nullity. A capture, *ex vi termini*, requires actual seizure and possession—a firm possession for a reasonable length of time; it may be, if made on land, for twenty-four hours after the battle is over, or by bringing the property seized *infra præsidia*, or by holding the same until the *spes recuperandi* is lost.—2 *Gall.*, 42; 8 *Cranch*, 189, 363; 7 *Wheaton*, 350.

No civilized nation now recognizes a paper blockade; and a blockade is usually an act of war. A belligerent *right* to do a thing is not the actual doing of it. A right to conquer the country of a foreign enemy is not its actual conquest. So the right to capture is not an actual capture. The one is a power which it is permissible to exercise, the other is a successful exercise of the permitted power; the one a power not called into practical use, the other an act accomplished; one is *in posse*, the other *in esse*. If the legal status of the present contest is, as argued by proctors, viz: a war to be governed solely by the law of nations, and consequently an international conflict between two existing and independent nations, most of the acts of Congress passed with reference to the rebellion will be wholly inapplicable; there can be no mere *paper* capture of rebel property of any kind—no lien, therefore, upon it for treason committed. But such is, in no sense, the present legal *status*. The distinction has been already stated at great length in this opinion, together with the principles on which it rests. The propositions and discussions and controversies involved are intraterritorial, except so far as other nations may be affected by naval or other operations beyond the municipal jurisdiction of the United States. The political department

of the Government is alone authorized to decide that *status;* and so long as it adheres to the rightful supremacy of the United States Constitution and laws over the whole country—that part in rebellion, as well as that still loyal—the *judicial must administer the laws applicable to municipal sovereignty, with respect to every question brought before it for adjudication.* It is not prepared, it is to be hoped, to admit, directly or indirectly, that the constitutional authority of the United States—its legitimate municipal sovereignty—is legally at an end in any part of the Union, and even if, by possibility, it could become so regardless of its solemn duty, its admission or action upon such an hypothesis would be a nullity in law. It has been entrusted with no such power. It must, on all such questions, follow the political department, in which alone such power is vested. It can neither make, nor unmake, constitutions or laws; declare war, or negotiate peace; pardon offenders, or absolve citizens from the duties of allegiance. Nor can a wrong make a right—the infraction of a law overthrow the law. Were it otherwise, there could be no legal punishment for crime, or safeguard for life, liberty, or property; for the moment a law was violated, and its protective care, therefore, most needed, the law itself would cease to exist; an act of murder, for instance, would abolish all law for its punishment, and an act of plunder all laws for the arrest or imprisonment of the offender. In a word, there could be neither law nor crime; for where there is no law there can be no transgression. If the transgression annihilates, by its own intrinsic force, the law transgressed, there can then be no transgression. Such a theory is suicidal—it subverts all moral, social, and legal problems—it makes society itself impossible, and reduces the world, not only in all its governments, but in all social and family organizations, to absolute anarchy and chaos.

The libel in "No. 940" is based on the theory of the fullest belligerent rights known to the laws of nations. But, as has been shown, without an act of Congress, those rights could not be exercised, even if international relations, and consequently the international code, governed the case. As, however, the country has, thus far, not been so unfortunate as to be plunged into those calamitous depths which would dictate so humiliating an admission as the independence of the so-called Confederate Government; and, as all men sworn to support the Constitution in its full and undiminished supremacy *de jure* must earnestly hope no such fatal conclusion is destined ever to be reached; the courts must still maintain that, within the municipal jurisdiction of the United States, the federal Constitution and laws are supreme—and their municipal sovereignty to be upheld.

It is not deemed necessary, therefore, to enter upon the wide field of inquiry opened by the argument concerning the war powers of the Gov-

ernment, nor to examine the disputed boundaries between the executive and legislative departments of the United States. As the Government, with the combined powers of all three of the departments, in which governmental authority is lodged and among which it is distributed, cannot, even as a totality or unit, transcend rightfully the limits of its creation or organism, so no one department thereof can do any valid act beyond its prescribed constitutional sphere.

That elemental truth is sacred to our national life. No one member of that governmental body can say to another "I have no need of thee," and refuse to perform its allotted functions.

Avoiding, therefore, that perplexing, and as yet unnecessary, inquiry, it is sufficient to decide now, that the theory on which the libel in case "No. 940" is based cannot be admitted, and is wholly inapplicable to the subject under consideration. The law of nations is not the source of governmental authority over the internal administration of affairs within this country, but the Constitution of the United States. So far as that Constitution adopts the international code, it is in force, but no further.

But, it is contended, that the libel in question rests for authority, also, upon the acts of August 6, 1861, and of July 17, 1862. To what has been already said on that head, it is only necessary to add, that it has not been so framed. Its allegations are not within the scope of either of those acts.

Where a forfeiture under a statute is to be enforced, the libel must bring the case within its provisions. This has not been done, generally or otherwise. There is not only no reference to either statute, but many of the essential elements of forfeiture specified in them are omitted altogether. From aught discovered in the libel, the property in dispute was owned at the time of its capture by loyal citizens of Missouri or Illinois; had been plundered from them and taken by the rebel force in arms into Mississippi, where it was recaptured. If so, it would fall under neither of those acts of Congress. True, if the case were a prize case, the claimant might show that fact, and the court would apply the rules of recapture. But, as it cannot be maintained as a prize case, *jure belli*, and as it has not the necessary elements to bring it within the statutes, and further, as the other case, "No. 939," embraced in this opinion, is under the statute of August 6, it would be remarkable to suppose a legitimate proceeding under the same statute for the same thing and bottomed on the same facts, would, at one and the same time, fall legitimately on opposite sides of the court. It was proper for the pleader to test the question by filing both libels; but when the court decided that the other libel was the proper one under the statute, it virtually pronounced this untenable. Similar comments apply to the other statute.

Another test of the irregularity of practice in these cases may be

drawn from rules governing appeals. The *res* is actually in custody here upon a warrant issued in case "No. 934," for a violation of the acts of July 13, 1861, and of May 20, 1862; and those cases are still pending. Whilst so in custody the libels in these cases were filed. If it should be held that the action in this case cannot be maintained, and an appeal is taken, how can the *res* be sent up to the appellate court, as the law requires? It will still be in custody here, to await the decision in the former case, and cannot be removed by such subsequent proceedings. Or, if the former action be maintained and forfeiture decreed, with an order of sale and distribution of proceeds, and no appeal therefrom be taken, would the *res*, or its proceeds, be withdrawn from the custody of this court and from the effect of its final adjudication, in order to abide the decision of the appellate tribunal in an entirely distinct and subsequent proceeding, not affecting the merits or validity of the case determined in this court? Well might Sir William Scott and Justice Story say such endless confusion is not permissible.

It must be remembered, too, that the acts of July 13, 1861, and of May 20, 1862, declare the property *forfeited for the offence committed*, while the act of August 6, 1861, merely declares it "subject to prize and capture.' The former acts seem to work a forfeiture, *eo instante*, and consequently the transmutation of title would refer to the time of the offence; but, under the latter, by analogy, such transmutation of title may take effect only from capture and judicial condemnation, and relate back only to the time of capture. And further, if it be true that municipal forfeitures are often swallowed up in the more general operations of the laws of war, still greater confusion would ensue from a multiplicity of suits on opposite sides of the court. Where by the terms of an act forfeiture is worked by the offence, the transmutation of title *relates* to that time, and all subsequent transfers are invalid.—8 *Cranch*, 398, 417; 8 *How.*, 381.

Those cases reverse Justice Story's opinion in "The Brig Mars," (1 *Gall.*, 192.) Where the first seizure or capture is abandoned, all rights under it are gone, and a new seizure is necessary. The last captors are the only ones to be considered in such cases.—*The Josefa Segunda*, 10 *Wheaton*, 312; *The Ann*, 9 *Cranch*, 289.

The main propositions discussed and ruled in these cases may be thus restated:

First. Captures, *jure belli*, are justiciable under the law of nations, and not by force of municipal sovereignty.

Second. They belong to the capturing sovereign; and whether any part thereof will be awarded to the individual captors depends solely on the grant of the sovereign.

Third. Maritime captures, or captures on the high seas, or captures

near the coast by naval forces, or by conjoint land and naval forces, are cognizable by prize courts, as such, which, whether organized under English commissions or acting as United States district courts, under the Constitution and laws of the United States, are international tribunals administering the law of nations.

Fourth. Captures of "enemy" property on *land*, if public property belonging to the adverse sovereign and confiscable by the laws of war, have seldom been subjected to judicial condemnation. The capturing sovereign may, if he pleases, grant an interest therein to the individual captors, and may submit the judicial questions arising therefrom to the determination of any of his courts or to commissions, but he is not bound to do so. The title in *land* captures does not depend on judicial condemnation, but on the certainty of possession—such as the detention *sine spe recuperandi*, &c.

Fifth. Captures on the high seas are made where no law obtains except the law common to all civilized nations, to wit: the law of nations. Hence the validity of such captures must be determined by an international tribunal whose rules of decision are international law, unmodified and unaffected by municipal authority.

Sixth. Captures of enemy property on land, as by invasion of the territory of the adverse belligerent, depend on the laws of conquest, independent of the rights or interests of neutral or friendly nations, and involve questions between adverse belligerents only. Such captures, by modern usage, are confined to public property—that is, property belonging to the adverse sovereign, exclusive of works of art, &c., and of the private property of non-combatants or peaceful inhabitants.

Seventh. Under the rules and articles of war adopted by the United States, such public property of a warlike character is seized and held by military officers, for the United States alone, and no part thereof is distributable to the individual captors.

Eighth. The foregoing rules relating to foreign wars, which are extraterritorial, are not applicable, except partially, to domestic or internal wars, which are intraterritorial.

Ninth. The source of authority in foreign wars is the law of nations; in domestic wars, municipal sovereignty. The distinction is between international and constitutional law. But questions with foreign powers, whether arising in peace or war, must be determined by international and not municipal rules.

Tenth. As the authority or power of the United States over the extraterritorial relations of the country is vested in the federal Government, the latter must be governed therein by international law, which furnishes in such cases the rules for its guidance and the limitations upon its action.

Eleventh. As, within the sphere of the constitutional grants of power,

it is *supreme* intraterritorially, it enforces the municipal sovereignty by rules of its own prescription—that is, by acts of Congress. It exercises its municipal sovereignty, not through international tribunals acting as do prize courts, *jure belli*, but through its own municipal courts, which are governed solely by its own internal laws.

Twelfth. Hence, in a domestic war, captures on the high seas from a third nation or neutral power are to be adjudged by an international tribunal whose rules of decision are derived simply and exclusively from the international law, because such captured property is not subject to the municipal sovereignty, either from the character of its owners or from the locality where found. Its owners are not subjects of the capturing sovereign, nor are the high seas within his territorial jurisdiction.

Thirteenth. But such captures of *rebel* property, whether on sea or land, are cognizable by municipal tribunals, because the owners are subjects of the capturing sovereign and amenable to his authority. He has over his own subjects and their property, and over his own territorial domains, all the rights and powers of a municipal sovereign. He derives those powers, not from the law of nations, but from the internal constitution of the country. The law of nations cannot increase or diminish his constitutional authority. All questions between him and his subjects are internal or municipal solely, and consequently justiciable only in municipal courts or tribunals.

Fourteenth. To determine which of many municipal tribunals has cognizance of a particular act of municipal sovereignty, recourse must be had solely to municipal law; which law, in United States cases, is the federal Constitution and acts of Congress.

Fifteenth. Captures of rebel property may fall under the sixth section of the act of July 13, 1861, or under the act of August 6, 1861. If waterborne, it is justiciable on the instance side of the admiralty courts; otherwise, on the common-law side of United States courts. Under the act of July 17, 1862, other principles obtain; for the confiscation therein named is punitive of treason and necessarily falls on the common-law side, whether the seizures under it are made on land or water.

Sixteenth. The act of March 25, 1862, was evidently designed to apply to prizes, *jure belli*, (except captures under the slave-trade acts,) for the machinery of prize commissioners, testimony in *preparatorio*, &c., have reference solely to such cases. It is competent for Congress, in regulating the practice in municipal cases in United States courts, to adopt so much as is deemed proper from any system of practice not incompatible with constitutional requirements; but the cases do not take their character or quality from the "practice" adopted, but from their intrinsic nature. Thus, as the slave trade is not piracy by the law of nations, but simply by municipal law, a case under that law is a municipal case,

to be tried as the statutes direct, and not by an international tribunal under the law of nations. If the mode of trial prescribed by statute is the same as that used in prize courts, *jure belli*, it is none the less a municipal and not an international case—is cognizable by a municipal, and not an international tribunal. The authority to punish proceeds from the internal constitution and laws. So with respect to all acts of Congress for the suppression and punishment of rebellion.

Seventeenth. It is competent for Congress to vest in United States civil courts the power to try all *land* as well as maritime captures, *jure belli;* and it is equally competent for it to withhold such power over land captures. It is bound, however, in good faith, to furnish a competent court for the trial of all maritime captures under the law of nations.

Eighteenth. The technical phrase "prize of war" relates only to captures, *jure belli*, from an adverse or neutral sovereign or his subjects, to be governed by international law. All other captures or seizures, that is, of property belonging to his own subjects, depend for validity upon his rightful, or constitutional, or lawful authority over the same. They are purely internal or municipal questions, and cognizable solely by municipal tribunals. Whether they are to be enforced, or the property condemned, the municipal law must decide. The law of nations cannot control or influence the decision.

Nineteenth. The power to suppress a domestic insurrection is a constitutional grant, and is to be exercised according to constitutional provisions. The Constitution, *de jure*, is not enlarged, altered, repealed, or suspended, in any of its provisions, because an insurrection exists. If one grant in that instrument rendered all other provisions nugatory, then the Constitution would consist solely of that one clause—the whole be subordinate to a part. The President, *virtute officii*, is commander-in-chief of the army and navy, in peace as well as war. He constitutes the whole Executive Department, and one of his executive functions is that of commander-in-chief. That one function is not superior to the aggregate functions of his presidential office; one is not superior to all. He derives no additional power from that command. The Executive Department includes all executive functions, and each function is limited by the restrictions and prohibitions which cover each and all.

Twentieth. No sovereign can conquer his own territory, or any part thereof, so as to have over the same the rights of a foreign conqueror, or of pure conquest. A limited sovereignty cannot thus become absolute. In overthrowing lawless resistance to rightful authority, he does not become clothed with rightful lawlessness; he does not, by a species of legerdemain, acquire the lawless authority which he has overthrown, change his power from what it rightfully was, into some new and ungranted right or rule. If he has successfully vindicated the Constitution against

its assailants, he has acquired no right to overturn it, and substitute in its stead a new instrument, or his own capricious will. To contend for such a result is to make him an insurrectionist, revolutionist, or rebel. The sovereign in this country is the "supreme law," and its assailant is the rebel. Suppressed assault upon it leaves it intact, in full force and effect. Hence in insurrectionary districts the Constitution and laws pursuant thereto are *de jure* supreme, notwithstanding their efficient and successful administration may for a time be obstructed; but the moment the obstructions are removed, the *de jure* becomes also the *de facto* supremacy. No new order of supremacy is thereby established, but merely the rightful authority of the old is vindicated.

Twenty-first. The distinction between international and constitutional or municipal law being fundamental, and absolutely essential to national independence, cannot be overlooked or disregarded without falling into the gravest errors, alike detrimental to the rights of parties, to national independence, and to civil and political liberty. When it is said that the law of nations is a part of the common law of Great Britain and of the Constitution of the United States, nothing more is meant than that the municipal sovereign in the former country, and the Federal Government here, are clothed for all extra-territorial or foreign relations with their full conduct and control; that the absolute sovereignty of the nation, so far as all foreign powers are concerned, is so lodged by the nation itself. Hence, as to all foreign questions and nations, the Federal Government is absolute; it represents the independence and equality of this nation as a coequal among equals in the family of nations; but as to all domestic or internal questions, its powers are defined and limited by its internal organization—the Constitution of the United States. It has no other or larger authority over its citizens than what has been granted by its organic law. The grant of powers is written and definite—just the same whether war or peace exists. Whether a granted power is called into full exercise or potential activity will depend upon the exigencies of the case; but those exigencies do not make a new grant, nor alter or abrogate the old grant. It continues the same, unchanged. Thus, the President is commander-in-chief in peace as well as war; that function of the presidential office is fixed and complete; but the exigencies of peace or war may call into action the rules of law legitimately applicable to each. Those rules are not new; but until a case arises for their application, they lie unused or dormant.

The law of nations, therefore, in the internal administration of the country, is not the *source* of power, nor does it enlarge or diminish the constitutional authority of the Federal Government. Whatever the Constitution permits, it can do, whether the law of nations prescribes a different rule or not; although, as the Supreme Court has intimated, it

cannot, as a civilized power, violate the just and humane rules of modern warfare, even in a civil war, without putting itself, *quoad hoc*, beyond the pale of civilization. A domestic insurrection is an internal question, and to be treated accordingly. All legal questions, therefore, which arise from the efforts of the Government, under the Constitution, to suppress such insurrection, are, so far as United States citizens and their property are concerned, intra-territorial or municipal, to be heard and disposed of by municipal tribunals, and not by courts sitting under or administering the law of nations.

Twenty-second. It follows, therefore, that captures, whether on sea or land, of rebel property, are not "prize of war," *jure belli*, and do not fall under pure prize law, or acts of Congress relating to prizes, *jure belli*. If acts of Congress authorize the capture and condemnation of rebel property, the jurisdiction is on the instance or common-law side only of the United States courts, whether said captures are denominated seizures, captures, prize of war, or by any other name. The real nature of those cases is determinable by the fundamental fact that they arise solely from the exercise of intra-territorial sovereignty. A change or confusion of names does not alter the inherent nature of the act. Whether such municipal captures are exclusively for the benefit of the Government, or the proceeds are to be shared by individual captors, must be determined by the acts of Congress authorizing such captures; and there is no act granting a distributive share thereof to the captors as prize of war within the meaning of mere prize statutes.

The exceptions to the libel in "940," therefore, are sustained, and the libel dismissed.

FINAL PROCEEDINGS.

A trial before a jury was subsequently had under the act of August 6, 1866.

The evidence was to the following effect: The cotton belonged to the so-called Confederate Government. A person claiming the right to control it came through the rebel lines and sold it to an army contractor of the United States, who, with the assistance of a United States Colonel, proceeded to the place where it was stored, eighteen miles distant from the Mississippi river, and within the rebel lines, using Government transports, wagons, and soldiers on the expedition. On the way, a rebel force was encountered; a brisk skirmish ensued; several U. S. soldiers were either killed or wounded; and the U. S. military forces succeeded in reaching the "Coldwater," where the cotton was stored in charge of a rebel officer. The cotton was captured, hauled to the Mississippi river

at a point several miles below Helena, loaded on Government transports, and forwarded to Helena, then a military post. At the latter place, General Steele happened to be in temporary command; and so soon as he learned what had occurred, he seized the cotton and turned it over to the quartermaster. So soon as General Steele was transferred to another post, the quartermaster delivered the cotton to said contractor, as the private property of the latter. It was then shipped on a steamboat, *en route* north. When it reached Memphis, it was reseized by order of General Sherman and shipped to the quartermaster at St. Louis, to be disposed of as the proper court might decide. During the interval between its discharge by the quartermaster at Helena and the reseizure by General Sherman's order, the said army contractor and others claiming title thereto, sold to the present claimants, who were informed of the dispute with reference to it.

The court held, that if the cotton had been transferred by its original owners, or with their consent, to the Confederate Government, it was liable to capture and condemnation by virtue of the act of August 6, 1861; that the title of the United States related back to the time of the original capture at Coldwater, unless there had been a voluntary abandonment of said capture; and that if the abandonment at Helena was through a fraudulent connivance between the said contractor and quartermaster, and if the present claimants knew at the time of their respective purchases what the facts were concerning the capture and claims to the property, then their purchasers were not protected, and said abandonment at Helena was not voluntary within the meaning of the legal rule previously stated.—12 *Mod. Rep.*, 92; *Salkeld*, 223; 5 *T. R.*, 112; 8 *Cranch*, 155, 398, 417; 3 *Wheat.*, 311; 16 *Pet.*, 362; 8 *How.*, 381; 1 *Story's Rep.*, 134; 1 *Gall.*, 192; 13 *Pet.*, 167; 10 *Wheat.*, 312; 9 *Cranch*, 289.

The verdict of the jury was for the United States on the issues joined; and thereupon the cotton was condemned and sold for the use of the United States.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

UNITED STATES
vs.
910 BALES OF COTTON—WITHENBURY & DOYLE, GRIEFF & ZUNTS, G. A. LE MORE & CO., CLAIMANTS.

HON. SAMUEL H. TREAT, JUDGE.

Opinion of the Court.

In April, 1864, the United States Navy seized 910 bales of cotton, on the bank of the Ouachita river, in the State of Louisiana. That part of Louisiana was then subject to rebel dominion, and had been from the breaking out of the rebellion. The cotton was brought into this district, and libelled as prize of war. It was sold under an interlocutory decree, and the proceeds deposited to the credit of the court. There are three claimants to these proceeds: Withenbury & Doyle, Grieff & Zunts, and G. A. Le More & Co. These claims are now submitted to the consideration of the court. The proofs disclose this state of facts:

1. The cotton was raised by Tatum & Simmons, near the place of seizure, and sold by them to the Government of the so-called Confederate States in December, 1862.

2. Withenbury & Doyle, being citizens of the State of Ohio, purchased the cotton from A. W. McKee, an agent of the Confederate States, in January, 1864. When the rebellion commenced, they were owners and masters of two steamboats, running between New Orleans and upper Louisiana. With these boats they rendered services to the Confederate authorities. The cotton was sold to them in consideration of these services. They, however, insist that the services were rendered under compulsion. They had the permission of the General commanding the United States forces in the Department of the Gulf to pass through the United States lines into upper Louisiana, and bring to New Orleans and sell twenty-five hundred bales of cotton.

3. On the capture of New Orleans by the United States forces, in May, 1862, the Louisiana State Bank, a monied corporation located in that city, had on hand a large amount of Confederate currency. In December, 1862, the commander of the United States forces in New Orleans authorized the Bank to dispose of this currency in the purchase of cotton within the rebel lines. Under this permission, an agent of the bank passed through the United States lines into upper Louisiana, and purchased the cotton in question of a sub-agent of McKee, in August, 1863. And in March, 1864, the bank sold the cotton to Grieff & Zunts.

4. Early in March, 1864, Leon Queyrouse, a naturalized citizen of the United States, residing in New Orleans, purchased the cotton of Buckner, an agent of the Confederate States. And, later in that month, Queyrouse sold the cotton to G. A. Le More & Co., citizens and residents of France.

Section 5 of the act of Congress of July 13, 1861, among other things, provides that "it may and shall be lawful for the President, by proclamation, to declare that the inhabitants of such State, or any section or part thereof, where such insurrection exists, are in a state of insurrection against the United States, and thereupon all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States shall cease and be unlawful so long as such condition of hostility shall continue."

The same section also contains this proviso: "That the President may, in his discretion, license and permit commercial intercourse with any such part of said State or section, the inhabitants of which are so declared in a state of insurrection, in such articles, and for such time, and by such persons, as he, in his discretion, may think most conducive to the public interest, and such intercourse, so far as by him licensed, shall be conducted and carried on in pursuance of rules and regulations prescribed by the Secretary of the Treasury."

On the 16th of August, 1861, the President issued a proclamation, declaring "that the inhabitants of the said States of Georgia, South Carolina, Virginia, North Carolina, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi, and Florida, (except the inhabitants of that part of the State of Virginia lying west of the Alleghany mountains, and of such other parts of that State and the other States hereinbefore mentioned as may maintain a loyal adhesion to the Union and Constitution, or may be from time to time, occupied and controlled by forces of the United States engaged in the dispersion of said insurgents,) are in a state of insurrection against the United States, and that all commercial intercourse between the same and the inhabitants thereof, with the exceptions aforesaid, and the citizens of other States, and other parts of the

United States, is unlawful, and shall remain unlawful, until such insurrection shall cease or has been suppressed."

We do not entertain a doubt as to the true intent and meaning of the act of July 13, 1861. Indeed, the language is so clear and explicit as to render discussion unnecessary. The act interdicts all commercial intercourse between the loyal and insurrectionary parts of the Union during the existence of the rebellion, except what may be licensed by the President, and conducted under regulations to be prescribed by the Secretary of the Treasury. It expressly declares all commercial intercourse, not within the exception, to be unlawful. Prohibition is the rule, and license the exception. The inhabitants of the loyal and disloyal districts are rendered incapable of dealing with each other so long as the rebellion continues. Every contract between them, not founded on a license, is simply void. It neither passes title nor gives a right of action.

The act invests the President with power to put the prohibition into operation, and define the limits of insurgent territory. This power was exerted by the proclamation of August 16, 1861, and from that date the prohibition had all the force of positive law.

It is clear that the contract between Withenbury & Doyle and the Confederate agent was within the prohibition. It was an act of commercial intercourse between citizens of Ohio and of that part of Louisiana in insurrection, in violation alike of the letter and spirit of the statute. The contract was therefore null and void. The claimants acquired no title to the cotton. The question of ownership remained unaffected by the transactions between the parties. They had no legal capacity to trade with each other. While the rebellion continued, it was not in the power of these claimants to acquire title to this property except through a license from the President.

It is equally clear that the Louisiana State Bank was within the prohibition. It is true that the city of New Orleans was originally within insurgent territory; but, on its capture and permanent occupation by the United States forces, it fell within the last exception in the President's proclamation, and ceased to be in a state of hostility to the United States. Such was the ruling of the Supreme Court of the United States in the case of "The Venice," (2 *Wallace*, 258.) And the President, in his proclamation of March 31, 1863, in again defining the limits of the insurrection, expressly excepts New Orleans. And this act of the President was prior, in date, to the purchase by the Bank. It follows, that, after the 6th of May, 1862, the prohibition extended to the inhabitants of New Orleans, and they had no more right to trade with upper Louisiana than had the inhabitants of Ohio or Illinois. Nor can the purchase of the bank be sustained under the permission of the commanding General. The President alone could authorize commercial dealing within the Con-

federate lines. As the bank acquired no title, it had none to transfer to Grieff & Zunts. The latter have, therefore, no interest in the property in dispute.

The case of G. A. Le More & Co. is just as free from doubt. Queyrouse, through whom they claim, was clearly within the prohibition. He had no legal capacity to deal with the Confederate agent. He acquired no title to the cotton, and consequently had none to transfer to Le More & Co. The fact that they were citizens of France does not alter the case. If they had purchased directly from the Confederate agent, perhaps they would have acquired title. But it is useless to enter upon the discussion of that question. It is enough for all the purposes of this case to say, that they reeeived no title to the cotton for the reason that Queyrouse had none to impart.

All of the claims must be dismissed.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

UNITED STATES
vs.
137 BALES OF COTTON—JOHN H. MCKEE, CLAIMANT.

HON. SAMUEL H. TREAT, JUDGE.

Opinion of the Court.

On the 16th of March, 1864, the United States Navy seized 137 bales of cotton and a lot of rope, bagging, and leather, on the bank of the Red river, in Louisiana. The proceeds of this property are now claimed by John H. McKee. The proof shows this state of the case: The claimant has been a resident of New Orleans since the commencement of the rebellion. The cotton, rope, bagging, and leather were the individual property of A. W. McKee, a resident of upper Louisiana, and, from October, 1862, to the fall of 1864, the general agent of the Treasury Department of the Confederate States, to purchase and dispose of cotton in the State of Texas and that part of Louisiana lying west of the Mississippi river. The claimant purchased the property in question of A. W. McKee, on the 4th of March, 1864. The proof tends to show that he had a license to trade in insurgent territory, issued under the provisions of the act of July 13, 1861. And he had permission from the commander of the United States forces in the Department of the Gulf to pass through the United States lines into upper Louisiana and bring away any property that he might there purchase.

Section 5 of the act of Congress of July 17, 1862, provides "that, to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits, and effects of the persons hereinafter named in this section, and to apply and use the same, and the proceeds thereof, for the support of the army of the United States." The enumeration of persons includes "any person hereafter holding an office or agency under the Government of the so-called Confederate States of America." And the section thus concludes: "and all sales, transfers, or conveyances of any such property shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the

possession or use of such property, or any of it, to allege and prove that he is one of the persons described in this section."

A. W. McKee accepted and held an important official position from the Government of the Confederate States after the passage of this statute. And he continued to hold that position when he transferred the property in question. The statute was therefore strictly applicable to him and the property. It deprived him of the power of making any valid disposition of the property. It expressly declared any sale or transfer to be void. In this state of the case it is very clear that the claimant acquired no title. His purchase was simply void, because A. W. McKee had no capacity to dispose of the property.

The claimant's license gave him no right to deal in this property. A statute subsequent in date to the one under which his license issued prohibited any sale or transfer of the property. The provisions of the act of July 13, 1861, so far as they are in conflict with those of the act of July 17, 1862, must give way. It is a familiar principle of law, that where two statutes are inconsistent with each other, the later statute must prevail. To the extent of the repugnance between them, the later statute is a modification or repeal of the former. If, therefore, the license issued under the act of July 13, 1861, in terms authorized the claimant to trade generally within insurgent territory, the act of July 17, 1862, must be considered as restricting that authority to the property of those holding no official relation to the Government of the Confederate States.

The claim must be dismissed.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

OCTOBER TERM, 1865.

ELGEE'S ADMINISTRATOR *vs.* LOVELL.

HON. SAMUEL F. MILLER, JUDGE.

Opinion of the Court.

The plaintiff sued the defendant in the circuit court of the State of Missouri, for the county of St. Louis, to recover possession of five hundred and seventy-two bales of cotton.

The defendant appeared and made affidavit that he held the cotton for the Government of the United States, as its agent, and prayed that the case might be transferred to this court, under the act of Congress of 3d March, 1863, which was ordered by the court.

In this court plaintiff filed the ordinary declaration in detinue, to which defendant pleaded the general issue and four special pleas. A demurrer to each of these special pleas was interposed by plaintiff.

The second plea, which was the first of the special pleas, averred, in substance, that the plaintiff was, at the time of the committing of the grievances in the declaration mentioned, a citizen and resident of the State of Louisiana, which had been declared to be in insurrection by the proclamation of the President, and was himself engaged in giving aid and comfort to the so-called Confederate States of America.

The third plea averred that the cotton mentioned in the declaration was held by the defendant as the agent of the United States, as abandoned property, seized and held under the act of Congress of March 12, 1863; but did not aver that it was taken or found in any district or State, the inhabitants of which had been declared to be in insurrection by the President's proclamation.

The fourth plea simply alleged that the cotton in question was the property of the United States.

The fifth plea alleged that the cotton in the declaration mentioned had

been taken in the State of Mississippi, within the district declared to be in insurrection by the President's proclamation, by Ralph S. Hart, a special agent of the Treasury Department, as abandoned property, and was sent to St. Louis and placed in the possession of defendant as agent of the United States, to be sold, or otherwise disposed of, in pursuance of the act of March 12, 1863, concerning captured and abandoned property in rebel districts.

The demurrers were argued by Glover and Shepley for plaintiff, and by Hughes, Drake, Broadhead, and Hill for defendant.

The second plea is evidently directed to the personal character of the plaintiff, and may be regarded as a denial of his right to bring any suit in this court, on the ground of his being a public enemy in time of war, or as a denial of his right to bring suit for property found in an insurrectionary district.

Looking at it in the first point of view, it must be held to be a plea in abatement in analogy to the plea of alien enemy, and is bad for want of any averment that the plaintiff was a public enemy at the time the suit was brought, for such a plea must have reference to the *status* of the plaintiff at that time.

But the plea of alien enemy is a good plea in *bar*, when the action is brought on a contract, and when the plea shows that the contract was made in time of war by a party in allegiance to the Government in whose courts the suit is brought, with a public enemy; and it is argued that the declaration in the present case alleges a bailment by plaintiff to defendant on a condition to redeliver on demand, and that the suit is therefore on a contract, and the plea is a good bar. It is true that there are authorities to show that the action of detinue is sometimes considered as an action of contract, and it is also true that the allegations of this declaration do in words set out a contract of bailment. But without pursuing the authorities as to when detinue will be treated as *tort* or as contract, it is sufficient to say that we think it would be straining the technical point beyond its just use to hold the plaintiff in this case to the literal meaning of the words used in his declaration. The form of words, like that in trover and ejectment, is purely artificial and conventional, and is never required to be proved on trial. It being clear, from what is upon the record, that the suit is grounded on a tortious seizure by the defendant of the cotton mentioned, we will not hold on this demurrer that he has sued on a contract because he has been compelled to use this fictitious form by the rules of pleading.

It is claimed, however, that the plea is good under section six of the act of July 17, 1862, (12 *U. S. Statutes*, 591.)

That act provides that the property of certain classes of individuals may be seized by the President, or under his orders, and turned over to

the courts of the United States, and then, by a regular course of judicial proceedings, be confiscated and sold. The closing provision of the sixth section of the act reads thus: "And it shall be a sufficient bar to any suit brought by such person for the possession or use of such property, or any of it, to allege and prove that he is one of the persons described in this section."

Waiving the somewhat doubtful question whether this plea does show that the plaintiff is one of the persons described in that section, we are of opinion that the bar applies to property seized under that act and to no other property. There is no claim here that this property was seized under the confiscation law, nor that defendant had any purpose to libel it in any court for condemnation.

The defendant having expressed a wish to amend this plea so as to make the allegation of the plaintiff's character apply to the time of bringing this suit, he is permitted to do so now, and such amendment being made, the demurrer to that plea is overruled.

The third plea is held bad for want of any allegation that the property which is claimed to have been seized as abandoned property was so seized in any State or part of a State the inhabitants whereof had been declared to be in insurrection against the United States.

The fourth plea is bad, because while the general property in the cotton may be in the United States, this does not exclude the idea of such a special property with right of present possession in plaintiff as will enable him to sustain the action.

The fifth plea presents the main ground of defence on the merits. It is a full statement of facts, which show that the cotton mentioned in the declaration was seized in one of the districts declared by the proclamation of the President to be in a state of insurrection, by a special agent of the Treasury Department for that district, as abandoned property, and was held by defendant when suit was brought, as agent of the Government, about to dispose of it as the act concerning that species of property required.

The objection taken to the plea is, that it does not aver that the property when taken possession of by the Treasury agent *was* captured or abandoned property, nor show in any other manner that it was rightfully seized by such agent. Although able arguments on both sides of this question have been urged concerning the rights which war confers on military and civil officers in an enemy's country, and on the part of the Government in reference to permitting suits to be brought for property in the hands of revenue officers, a majority of the court are of opinion that the solution of the question must be found in the construction of the act under which the Treasury agent proceeded, namely, the act of March 12, 1863, (12 *U. S. Statutes*, 820.)

This statute enacts that property in any of the States or parts of States, the inhabitants whereof have been declared to be in insurrection, which has been captured by our military forces or been abandoned by its owners, shall be taken into the possession of special agents of the Treasury Department, appointed for that purpose, and, after appraisement, may be used by the United States, or sold, and proceeds of the sale be deposited in the Treasury. Section three, after providing that said agents shall give bond, with sureties, in such amounts as the Secretary may require, and as often as he may require, and directing them to keep, in proper books, accounts of all their transactions, adds the following clause: "Any person claiming to have been the owner of any such captured or abandoned property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof, in the Court of Claims, and on proof of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, receive the residue of such proceeds after the deduction of any purchase money which may have been paid, together with the expenses of transportation and sale of said property, and any other expenses attending the disposition thereof."

Was it the intention of Congress to make this the exclusive remedy of any person whose property had been taken by the proceeding under this act, or was it intended to permit the Treasury agents to be sued for the possession or proceeds of such property wherever the party interested might find a court of general jurisdiction?

The hardship on the one hand of allowing these agents to seize upon any property anywhere in the insurrectionary districts at their discretion without liability to the law, and on the other hand of subjecting persons in their situation to be harrassed by litigation at the hands of any one claiming an interest in the property, have been forcibly urged upon us. In this connection it is not inappropriate to remark that their functions were to be exercised, so far as seizure of property was part of their functions, in an enemy's country. It was, further, a necessary condition that this could only be done in an enemy's country which had been overrun and occupied by our military forces. With all the movable property of the country subject to seizure and destruction by the military forces, or by the more lawless mob in their absence, it could be no great hardship to any loyal man to have his property taken in charge by the United States Treasury agents with a provision for its restoration under proper circumstances, or that of its proceeds when sold; and certainly Congress was not legislating for the benefit of the disloyal.

On the other hand, if an agent of the Government exercising this function, so delicate and so odious in an enemy's country, surrounded by hostile inhabitants, was to have every step of his proceedings tested by

courts of law, and this to be permitted by the very Government he was serving, it may well be imagined how useless would be his office to the Government, and how few men of responsibility would be willing to accept it.

It is to be observed, also, that in the rebel districts where these acts were to be done there were no courts in existence save such as were the offspring of military rule. *Inter arma silent leges.*

Looking to the provisions of the act itself, we find that these agents are required to give bond, with accepted security, on which, no doubt, they may be sued for wilful violation of their duty. The act makes the Government a mere holder of the property, or its proceeds, as trustee for the proper person, and provides a means of ascertaining who that person is. The Government itself could not be sued for this or any other act of its agent, without the right which is given by this provision; and of course can only be sued in the manner and in the forum thus pointed out. To suppose that Congress had sent its civil agents into a hostile country to perform these delicate functions, and had left them liable to be sued in any court where they might be found, for full compensatory or vindictive damages, while it provided a special forum, and a more limited liability for the Government, is a reflection on that body which I think it has not deserved.

The act evidently contemplates that property may be seized and sold, the proceeds of which ought to be returned to its owner. And this it provides shall be done through the Court of Claims. Is this remedy less applicable to property which may not have been actually abandoned, but seized under the belief that it was, than to cases where it was actually abandoned, or captured without being abandoned? It is urged, with some plausibility, that this remedy in the Court of Claims assumes that the property to which it applies was captured or abandoned; and if it was not, that the remedy does not apply. I think this is sticking in the bark, and that it was intended by Congress to give this remedy in all cases of seizure by agents acting under this law, whether the property comes strictly within those designations or not, and that on any such application the plaintiff will only be required to prove his ownership and his loyalty, and no question will be raised about the abandoned condition of the property in that court.

I think, for these reasons, that this was intended to be the exclusive remedy in this class of cases, except so far as an agent might be held liable, in some instances, for wilful violation of his duty, by suit on his official bond in the name of the United States for the benefit of the party injured.

The demurrer to this plea is overruled.

At a subsequent day in the term, plaintiff filed replications to the second and fifth pleas, which were demurred to.

These replications were the same in substance, and alleged that plaintiff had at some time before the bringing of the suit, not more specifically shown, taken the oath prescribed by the amnesty proclamation of the President of December 3, 1863, and faithfully kept the obligations of said oath.

The court holds that the act of Mareh 12, 1863, evidently contemplated that property of loyal citizens might and would be taken under it, for the provision for asserting claims to it in the Court of Claims is restricted to such persons as can prove that they "have never given any aid or comfort to the present rebellion." Such persons, never having been guilty of any offence against the Government, need no pardon, and are certainly in as good condition as a pardoned traitor.

Yet, as we have already shown, these persons can only find remedy in the Court of Claims, as prescribed by the act of Congress, even if the property be owned by a citizen of a loyal State.

The amnesty of the President cannot, and was not intended to, place a man who had committed treason in a better situation, in reference to such property, than that occupied by a loyal citizen of a loyal State.

This replication is therefore bad as an answer to the fifth plea.

Does it remove the disability to sue, which is set forth in the second plea?

That plea is not founded on any act of Congress, nor any case growing out of our State or National jurisprudence. It is a part of the law of nations, recognized and enforced in all civilized countries, that in time of war a citizen or subject cannot sue in the courts of the country with which his nation is at war. This grows out of the principle that persons, citizens or subjects of the nations then at war, are themselves enemies to each other, and in a state of hostility. In the war of the current rebellion this principle is applicable to all the citizens of the rebellious States found within the so-called Confederate lines.—*Prize Cases*, 2 *Black*, 674, 693; *Mrs. Alexander's cotton*, 2 *Wallace*, 421.

According to this principle, a man residing within the Confederacy, and subject to its control, was, in the sense of international law, a public enemy, although he may have committed no act of disloyalty. He is so far a public enemy, while the war was flagrant, that his property found on the high seas is lawful prize of war, and that we cannot in our courts maintain any suit against a citizen residing in a loyal State.

These are the disadvantages imposed upon him by the law of nations, but not by our local or national jurisprudence. And as no proclamation of the President can alter or change this law, I doubt very much whether

it can relieve any party from the disabilities which it imposes in our courts.

This disability is independent of any personal guilt, and grows out of no violation of any criminal law or statute. The right of the President to grant pardon for all offences against the laws of Congress, to extend amnesty wherever there had been personal guilt or actual violation of law, is not questioned. But whatever his power may be, I feel very sure that the President intended no more than this. He had no idea of placing the traitors who availed themselves of his proclamation in a better position than those who, residing in the insurrectionary districts, had always maintained their allegiance to the Federal Government.

Such persons need no pardon. In my judgment, all their personal and proprietary rights are fully restored when the war is over. The temporary disabilities which the necessities of a civil war imposed upon them cease with that necessity; and, in all courts and in all places, so far from needing a pardon, they merit the gratitude of the Government and of the people. It is absurd to suppose that the President, if he had the power, intended to place traitors in a better position than such loyal persons occupied, or that they needed Executive clemency to restore any of their rights.

That plaintiff may, after taking the oath, have become a loyal citizen, and, at the time of bringing this suit, may have been under no disability from residence, may be true; but this replication does not show it, and is therefore bad.

IN THE SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1867.

MILES SELLS, *Administrator of* JOHN K. ELGEE, *plaintiff in error* vs. OLIVER LOVELL, *Defendant in error* } Error to the Circuit Court of the U. S. for the Districts of Missouri.

STATEMENT OF THE CASE.

This is an action for the recovery of 572 bales of cotton, originally brought in the Circuit Court of the county of St. Louis, State of Missouri, and thence transferred to the Circuit Court of the United States for the Districts of Missouri; where judgment was rendered for the defendant; to reverse which, the case was brought to this Court by writ of error.

The questions involved turn wholly upon the pleadings; and in order to put out of view much that is contained in the record, but having no bearing upon the case to be passed upon here, it is necessary to give a succinct history of the pleadings.

At page 9 of the printed record, is the amended declaration in detinue, intended to supersede the petition originally filed in the State court. This is the beginning of the case, so far as its hearing in this Court is concerned.

On page 11 of the record, is a plea in abatement filed by the defendant, which was demurred to, and the demurrer sustained, p. 12. That plea, therefore, is not before this Court.

On pages 12, 13 and 14 of the record, is a plea to the jurisdiction, which was withdrawn, p. 15, and is therefore not before this Court.

On pages 15, 16 and 17 are the defendant's pleas, 1, 2, 3, 4 and 5.

On pages 18 and 19 are plaintiff's joinder of issue on plea No. 1, and his demurrer to pleas No. 2, 3, 4 and 5; and on page 20 is the judgment of the court overruling the demurrer as to the pleas Nos. 2 and 5, and sustaining it as to Nos. 3 and 4.

By the joinder of issue on plea No. 1, and the demurring out of Nos. 3 and 4, the only pleas remaining, were Nos. 2 and 5.

On page 21 will be found two replications to plea No. 2, the first of which concluded to the country, and is not therefore, before this Court. The second concluded with a verification, and was demurred to, p. 22; and the demurrer was sustained, p. 27, and an order made allowing an amended replication, p. 27, which amended replication is on pp. 28 and 29. On pages 29 and 30 the defendant demurred to this replication; which demurrer was overuled, p. 30, and thereupon the defendant filed a rejoinder, p. 31, upon which issue was joined. So plea No. 2 is not before this Court.

Issue having been taken on pleas No. 1 and 2, and Nos. 3 and 4 having been demurred out, the only questions to be passed upon by this Court are connected with plea No. 5, on p. 17 of the record. On page 22 of the record is a replication to that plea, which is not before this Court; it having been demurred to, p. 23, and the demurrer sustained, p. 27, and an amended replication filed, pp. 28 and 29. This amended replication was demurred to, and the demurrer sustained, p. 30. The plaintiff decided to abide the decision of the court on this demurrer, and final judgment was entered for defendant p 31.

The subject-matter of the controversy, therefore, is in plea No. 5, on page 17, and the amended replication thereto, on pages 28 and 29.

This plea sets up, in substance, that the 572 bales of cotton, for the recovery of which the action was instituted, had in March, 1864, in the State of Mississippi, been taken, received, and collected as abandoned property into the possession of a special agent of the Treasury Department, appointed to receive and collect abandoned or captured property in said State, in pursuance of the act of Congress "to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States," approved March 12, 1863; that the State of Mis-

sissippi had, by the Proclamation of the President of the United States of July 1, 1863, been designated as in insurrection against the Government of the United States; that the cotton was forwarded by said special agent to a place within the loyal States, and in the course of its transmission came into the possession of the defendant as agent of the United States, and when this action was instituted, was in his possession as such agent, and not otherwise; that his possession was in pursuance of the act aforesaid, and not otherwise; and that the cotton was claimed by the United States as abandoned property under that act.

The amended replication to this plea sets up, by way of avoidance, that the plaintiff's intestate, John K. Elgee, had, prior to the commencement of this action, taken and subscribed the oath prescribed in the Proclamation of the President of the United States of December 8, 1863, and did, after taking, keep it inviolate, whereby his right of property in the cotton was restored to him.

The question raised on the record is, Whether this was a good replication?

ARGUMENT.

The amended replication relies upon Elgee's having taken the amnesty oath under the Proclamation of December 8, 1863, as a complete reply to the fifth plea.

We will, therefore, first examine the legal effect of that oath as to the *rights of property* of him who takes it; for it is only as to such rights—not as to the personal right to maintain an action—that the question arises under that plea.

I. The broad ground may be taken, that the Proclamation did nothing more, and could do nothing more, than restore parties taking the oath to a former *status*, which had been affected by their rebellion. It did not assume to confer any new rights, nor did it promise a *full* restoration of former rights, but only such restoration as it was in the power of the United States to make; the intervening rights of third persons in property being expressly recognized and reserved.

II. The promise in the Proclamation of restoration of rights of property necessarily includes a recognition of the following points:

1. That rights of property had been devested from those to whom the amnesty was tendered:

2. That those rights had been devested by the authority of the United States: and

3. That they had been vested in the United States; else the United States could not restore them.

III. The question then arises, how and when did the rights of property become devested, which the Proclamation promised to restore?

This is answered by the Proclamation itself, in the preamble, under the third "*Whereas*;" where reference is made to the Confiscation Act; clearly indicating that the rights of property intended to be restored by the Proclamation, were those which by that Act were declared forfeited or confiscate.

IV. The Proclamation cannot be construed to relate to the "captured or abandoned property" referred to in the Act of March 12, 1863, because—

1. The restoration of rights of property promised by the Proclamation was an incident of the pardon, and therefore could not be construed to include any rights except such as had been forfeited by the crime for which pardon was tendered by the Proclamation:

2. The rights of property to be restored under the Proclamation were, exclusively, such as had belonged to rebels; whereas, under the Act of March 12, 1863, it was not alone the property of rebels which, when abandoned in insurrectionary districts, was liable to be taken by the special agents of the Treasury Department; but *all* such property, whether of rebels or loyalists, was subject to be so taken, because abandoned:

3. Applying the principle previously stated, that the Proclamation could promise restoration of such rights of property only as the United States had become vested with, it cannot be held to refer to abandoned property, because the rights of parties to such property do not, by the fact of the property being taken by the Special Agent of the Treasury Department, become vested in the United States, nor will they become so until the expiration of two years after the suppression of the rebellion, without any claim being interposed; or until, in a suit in the Court of Claims, the right of a claimant of it shall have been decided against him. Until one or the other of

these conditions arises, the United States are a mere trustee, holding the proceeds of the abandoned property for such person as may, in the Court of Claims, prove his right thereto, in compliance with the Act of March 12, 1863.

V. The Proclamation cannot have effect to set aside and abrogate the provisions of the Act of March 12, 1863, as it must be held to do if the replication be sustained. It cannot be so held, because—

1. It makes no reference to that Act:

2. If it did refer to it, the President had no power to proclaim a restoration of rights of abandoned property, when that Act provides for no such restoration by him. In fact, that Act does not treat the right of property as devested from the true owner, except so far as concerns his reclaiming the specific article taken. That he can not do; for the act provides for its conversion into money, and the holding of that money in the Treasury to respond to his claim, when he shall present and substantiate it, as provided in the Act:

3. It is conclusive that the Proclamation had no reference whatever to the restoration of rights in abandoned property, that it does not prescribe the terms indicated in that Act, as those upon which the proceeds of property should be decreed to a claimant; which terms are—

That the claimant shall prove his ownership of the property:

That he shall establish his right to the proceeds thereof:

That he shall prove that he never was engaged in rebellion against the United States, and never gave aid or comfort to those so engaged: and

That all this shall be done *in the Court of Claims*, and not elsewhere; and done within a specified time, and not before or after.

On the contrary, the only terms prescribed in the Proclamation for the restoration of rights of property are, the taking and registration of the oath, and the subsequent keeping of it inviolate by the party taking it.

The conclusion, then, is fairly justified, that the Proclamation referred only to rights of property affected by the Confiscation Act, and not to those connected with abandoned property; and, therefore, the taking of the Amnesty Oath by Elgee can have no bearing upon the property in dispute in this case.

VI. But supposing the case to be otherwise, and that the Am-

nesty Oath had the effect of restoring to Elgee his rights of property in the cotton, it could have no effect upon his right to sue the defendant in the State court or in the United States circuit court. In neither could he maintain this action, for the following reasons:

1. The taking of the cotton in the enemy's country by the agent of the Government, under the act of March 12, 1863, upon a claim that it was abandoned, had the effect of devesting all private rights to it *in specie*, and converting them into a claim upon the United States for the proceeds of it after a sale:

2. The well-settled rule is, that no action lies in favor of the subject against the sovereign; and as an action against an officer of the United States, to take from him property which, as an officer he holds for the United States, is in effect an action against the United States, it cannot be maintained:

3. No action against any officer of the United States is authorized by the act of March 12, 1863, and therefore cases arising under that act constitute no exception to the general rule:

4. The provisions of that act which require abandoned property to be forwarded to a place of sale within the loyal States, and sold at auction, and the proceeds paid into the Treasury of the United States are, in effect, a prohibition of any action against any party who, as an officer, or agent of the Government, may have the property in his possession *in transitu* to the treasury; else how could those proceeds get into the treasury, as long as any person should choose to sue the officer or agent?

5. If it be objected that unless this action be sustained, the plaintiff is without a forum, the answer is, that if he never gave aid or comfort to the rebellion, the Court of Claims is open to him, where, upon establishing his non-complicity with the rebellion, he can get judgment for the proceeds of the cotton, if he was its owner, and is still entitled to the proceeds; and if he was a rebel, he is not entitled to any forum; for the United States does not provide a forum for suits against itself by rebels.

VII. If, however, it be contended that the fifth plea is bad, because it does not allege that the cotton was, in fact, abandoned, the answer is, that that question is immaterial; because—

1. However it got into the hands of the Government's officer, under a claim of right by the Government, the latter could not be sued

indirectly through its officer, any more than by direct action against itself:

2. If the question of abandoned or not was designed by the law to be tried at all, it must be tried in the only forum for the decision of the whole case: but

3. That question is of no consequence, since the right of the party to any recourse does not depend upon the fact of abandonment or non-abandonment, but upon his personal right to the property, and his non-complicity with the rebellion.

If both those points are shown, he becomes entitled to the proceeds, though he had, in fact, abandoned the cotton; if they are not shown, he is not so entitled, though he had not, in fact, abandoned it. Therefore, the allegation that it was abandoned, is not necessary to the sufficiency of the plea; nor would proof that it was not abandoned sustain the action.

C. D. DRAKE,
Att'y for Def't.

SUPREME COURT of the UNITED STATES.

DECEMBER TERM, 1867.

MILES SELLS, ADMINISTRATOR OF JOHN K. ELGEE, PLAINTIFF IN ERROR,
vs.
OLIVER LOVELL, DEFENDANT IN ERROR.

No. 63.

By way of reply to some of the points made by the defendant's counsel, I have to say: 1st. It is a mistake to suppose that the President intends to, or does, in fact, confine the operation of his proclamation of the 8th of December, 1863, solely to property which had been declared forfeited by the confiscation acts of Congress. The first "whereas" recites "that many persons have committed, and are now guilty of treason," &c., and the last "whereas" declares, "that it is now desired by some persons heretofore engaged in said rebellion to resume their allegiance," &c. *Thereupon*, the President proclaims "to *all* persons who have participated in the existing rebellian," &c. Taken together, these paragraphs explode the theory of defendant's counsel, viz: That the President intended to limit the operation of the proclamation to the restoration of such property as had been declared forfeited or had been confiscated.

But, if this view were not strictly correct, the strong language of the proclamation, "that full pardon is hereby granted to them, and each of them (meaning all the persons before described, except the class therein excepted,) *with full restoration of all rights of property*," &c., would put a complete extinguisher upon this construction of this proclamation by defendant's counsel.

2d. The proposition of the defendant that the pardon promised did not cover or embrace those contemplated in the act of the 12th of March, 1863, is a strange misconception of the law. 1st. The act

contemplated that the property shall either be *abandoned* or *captured*, and if it falls within either of these predicaments, its owner may as well be a rebel as a loyal citizen. In the one case, if captured, the necessary implication of law and fact is that it was captured from an enemy. There could not well be a capture without resistance, and resistance implies that force is opposed to the authorities of the United States who are making the capture, and that must come from an enemy. The same remark applies to the case of property taken as "abandoned." The implication being that the owner has abandoned it because he was a rebel, and as such had fled. This provision of the act must be construed by the other legislation of Congress inaugurated to suppress the rebellion. That legislation is directed against the property of rebels who are in arms, or may have given aid and comfort, (vide the acts of the 13th of July, 1861, and the 17th of July, 1862.) The sixth section of the last of these acts declares that certain property and rights of property "shall be liable to seizure," &c., and that "all sales, transfers or conveyances" thereof, "shall be null and void." Here, neither by the terms of the act, nor yet by operation of law, is the title vested in the United States. Something else must be done, some steps must be taken, before the title of the rebellious citizen is divested in this property or these rights of property. And yet until the President interposes by his Executive clemency, the property thus anathematized by the law, is in the same predicament as the property held or taken under and by virtue of the provisions of the act of the 12th of March, 1863, until the President's proclamation of pardon becomes operative in its behalf, its free enjoyment by its rebel owner is impossible ; but the moment he comes within the benign influence of that proclamation, he and his property are from this legislative disability. Thus, it appears that the proclamation is not confined to the restoration of property, the title whereof is vested in the United States.

3d. But, if this were not the plain interpretation of these statutes, this Court has said, and so the law always was, that the President's pardon covered not only the offense before conviction, but after conviction, and, except as to the rights of third persons absolutely vested, it restored offices forfeited and property.

Ex-parte Garland—4th Wallace, 333.

The effect of a full pardon is to free the offender from punishment, whether of imprisonment or pecuniary penalty.

Thomas *vs.* Sowell, Vaughn, 330.
Toombs *vs.* Ethington, 1 Lev., 120.
1 Bishop's Criminal Law, Sec. 713.

4th. But, this prerogative of the President is not derived from the Legislative will. It springs from the organic law. Congress can neither limit or circumscribe its power. In the language of a majority of the Court in Ex-parte Garland, "The benign prerogative of mercy reposed in him cannot be fettered by any legislative restriction." It is a great mistake, therefore, to suppose that Congress has the authority, if it had the disposition, to limit this power of pardon. But, there is not, of fact, any attempt in any of these acts to exercise such authority, and I submit that the Defendant's counsel is wholly mistaken in the view which he has presented on this point in his brief.

5th. Having already argued that this Act of the 12th of March, 1863, was not operative to control this cotton until its proceeds were actually in the Treasury, (that fact being necessary to give the Court of Claims jurisdiction) I wish to add that all questions of ownership that could arise, might well be disposed of in any form where the law had jurisdiction of the persons of the parties. That being the fact in this case, it was eminently proper that Judge Elgee should claim that the Defendant was unlawfully withholding his property from him, a legal citizen of the United States, by a fraudulent claim of title. He had the right to show, if he could, that this property had been taken by no legal authority, by no warrant of law. He had the right to have that question tried in the Circuit Court. To hold that he had not would be a protest against the jurisdiction of this Court to inquire into the validity of the act of any man who might assume the authority of the United States. If this was not "abandoned property" then it was illegally and unlawfully taken; and if it was abandoned property and yet was not taken by one authorized by law to take it, it was illegally held by the Defendant. But, I have heretofore argued that this Act of the 12th of March, 1863, was not passed to cover the case of this plaintiff, and I think I have shown satisfactorily that it was intended for a different class of citizens, and that if it does not embrace his case, then the Courts of the United States are opened for him to have his rights to the property enquired into. But, I am met here by the declaration of Defendant's Counsel, that if the Plaintiff was a rebel, he is not entitled to any forum. This must rest upon

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1867.

MILES SILLS, Administrator of JOHN K. ELGEE, Plaintiff in Error, *vs.* OLIVER LOVELL, Defendant in Error.	Error to the Circuit Court of the United States, for the District of Missouri.

FACTS.

This is a proceeding brought to reverse a judgment of the Circuit Court, and the errors arise on the pleadings.

John K. Elgee was a citizen of the State of Louisiana, and had been for many years before the recent rebellion, and resided at Alexandria, in the parish of Rapides, until shortly before the commencement of this suit, when he moved to and afterwards resided in New Orleans until his death. He voluntarily took and subscribed the oath of allegiance in pursuance with the invitation of the President of the United States, in his proclamation of the 8th of December, 1863, and ever after kept it inviolate That was prior to the commencement of this suit, and up to the period of his death, he continued to reside in New Orleans, and to keep the oath and maintain his allegiance and fidelity to the United States.

This suit was brought to recover the possession of 572 bales of cotton, his property, raised by him, which were held by the defendant, Lovell, in St. Louis, where suit was instituted. The action is replevin. The defendant claimed to hold the same as a United States Treasury Agent, as "abandoned property," the same having been "*taken*," received and collected, as abandoned property, into the possession of one Ralph S. Hart, a special agent, appointed by the Secretary of the Treasury, to receive and collect "abandoned or captured property," in the State of Mississippi, where said property was found by said Hart, and where it was raised by Elgee.

The defendant pleads, 1st. The general issue, non-detention, and four special pleas, but demurrers were sustained to the 3d and 4th, leaving the 2d and 5th to reply to.

The second avers that plaintiff was a citizen of the State of Louisiana, the people whereof were in rebellion against the laws of the United States, and said Elgee was then and there in rebellion, and did then and there adhere to and aid and acknowledge allegiance to the so-called "Confederate States of America," and was then and there a public enemy of the United States, and not a loyal citizen thereof.

To this plea the plaintiff demurred, and his demurrer was overruled; whereupon he replied that he had taken the oath of allegiance before the suit was brought, that he resided in New Orleans, which was not in rebellion, that he was a loyal citizen, and that by reason of his so having taken such oath, etc., his property and other rights were restored to him.

The fifth plea sets up that prior to the institution of this suit, in March, 1864, in the State of Mississippi, Ralph S. Hart, a Treasury agent, "took, secured and collected" the cotton as abandoned property, in pursuance with the terms of the Act of Congress of the 12th of March, 1863. That said State was at the time and prior to the taking, by said Hart, and had been,

by the proclamation of the President, declared to be in insurrection. That the cotton was forwarded to defendant as the agent of the United States, who claimed it as abandoned under the Act aforesaid.

To this plea there was a demurrer and it was overruled; whereupon the plaintiff replied that prior to the commencement of this suit he had been restored to all his rights of citizenship and property by taking the oath of allegiance and removing to New Orleans, which was not embraced within any insurrectionary district by the proclamation of the President—which oath he ever kept and maintained inviolate.

To this replication the defendant demurred and the demurrer was sustained.

One and the chief error is the ruling of the Court on this demurrer to the amended replication to the fifth plea, though there are some questions which precede it and must be considered in advance of those raised on the plea and replication.

ARGUMENT.

1st. The *General issue* raises all the questions presented by these special pleas, and the facts which they set up may be given in evidence under it. These pleas amount to the general issue because they are all in bar, not admitting plaintiff's title, unless it may be the second one; and where they are in bar the rule is that it is bad pleading to file them along with the General Issue. All pleas are demurrable that attack plaintiff's title.

1 Chitty's Pleading, 498.

In Replevin the General Issue is the only plea properly pleadable, because all matters of defense are admitted under it, which the plaintiff would be bound to prove to maintain his action.

2d Saunders' Pleading, 462.

Under this plea the plaintiff may offer in evidence any matter which affects the plaintiff's title.

1st Chitty's Pleading, 526–28.

2d. The second plea denies the right of the plaintiff to sue' claiming that his political status as a citizen of a rebllious state' whose people were in insurrection against the United States, and at war with the same, and said Elgee was so unlawfully engaged and did adhere to and aid and acknowledge allegiance to the so-called Confederate Government of the Confederate States of America, and was then and there a public enemy, etc.

The plaintiff replies his oath of allegiance and his residence in New Orleans, and the Court holds it a complete answer to this plea and maintains his right to sue in that Court. Whatever of disability he may have labored under prior to the taking of this oath, and removing to New Orleans, these two facts concurring before the suit was brought, re-established his status of citizenship and enabled him to sue in the Courts of the United States. It is not easy to perceive a proposition more clearly recognized and established than this. The question is fairly presented in the plea. The disability of the plaintiff to sue is set forth and forcibly insisted upon. He is declared to be "a public enemy of the United States and not a loyal citizen thereof." I suppose if he is a "public enemy," it is very clear that he is not a "loyal citizen." Still, the pleader meant to put this plaintiff's disqualification to sue in the strongest light, and, therefore, he accumulates terms. It is the old plea of Alien enemy amplified and localized, made to suit the peculiar phase of our late war. The Statutes disqualifying rebels from having any standing in the loyal Courts, and from asserting title to property or rights of any kind in Court, are invoked and are made to stand guard at the very entrance to the Courts of Justice. The replication meets this issue boldly and puts

the plaintiff's case as fairly. He may have been a public enemy, he may have been a resident in rebel territory, and may have given aid and may have adhered to the rebel government; still, these offenses, however henious and however much at war with the law and the Constitution of the United States, were forgiven and obliterated by the oath of allegiance and his removal to and residence in a loyal district.

His rights, political, judicial, personal and property were fully restored, and he could appear in a loyal Court and assert one or all of them like any other suitor.

But the maintainance of this replication did more. It recognized and affirmed the complete restoration to the plaintiff of his rights of property of the goods herein in controversy. In the first place, his right to sue for them is admitted, and in the second place, his ownership is recognized and admitted. It is not denied in these pleadings that he was the owner of this cotton, and except for these Statutory disqualifications, he might maintain that ownership against the world.

This second plea and this replication brings us to this result The principle of law ruled, on the demurrer to the replication is that the oath of allegiance and the residence in New Orleans restored this plaintiff to his property, if in fact he did lose it by his previous status in the war.

Thus, then, we find that the plaintiff, when the suit was commenced, had the right to bring it, that he had a fair standing in Court, that he had complete restoration of all his rights, including those of property, and whatever standing any other loyal citizen had in the Courts, he had and fully enjoyed.

His right, then, to litigate his title and claim to this cotton in that forum was complete, unless there is some law taking away from that court the jurisdiction of the person or the thing in controversy.

I may remark here, in passing, that I do not understand that

the public law of nations applies to or in anywise controls the status of our own people, whether loyal or disloyal. Their actions towards our Government are defined and controlled by our own Legislation. As long as their property remains within our territorial jurisdiction, whether temporarily withheld from us by rebellious citizens or not, that property can not be effected by the law of nations. The fact that it is within insurgent lines, for the time being, makes it enemy property, and liable to be seized and confiscated, without reference to the status of the owner, provided he is within rebel rule. His loyalty can not help him. All within those lines are, for the time being, enemies. The reason of this rule is that both their persons and their property are subject to the order and command of rebel rule. But the moment they come within our lines, and their property is beyond the control of the insurgents, if they are loyal, they can enjoy that property, free from the taint of treason.

In this respect is the difference between enemies created such by the laws of war and enemies made such by a rebellion *within* the territorial limits of a nation like ours.

In the Alexander Cotton Case (2d Wallace, 404) the court defines this difference with great precision and clearness.

2d. The fifth plea and replication presents many questions not free from difficulty. There was a demurrer to this plea, which was overruled, and then a demurrer to the replication, which was sustained, and no further reply was made to this plea. By the rulings on these two demurrers the court decide that the Circuit Court had no jurisdiction of the case; that the act of 12th March, 1863, gives exclusive jurisdiction of this class of cases to the Court of Claims; and that no proclamation of the President can alter or change the law of nations which makes citizens of a disloyal State public enemies, because that is the law of nations or law of war, applicable alike to all wars, and applies to our citizens and their property in the recent re-

bellion. While it is not easy to reconcile this doctrine with the rulings in reference to the replication to the second plea, I think it is an easy task to show that it is wholly misconceived in its application to this case. If the President could relieve the rebellious citizen by his proclamation by the observance of the rule therein laid down, so as to restore to him his rights of person and property, in one case, why may he not do it in any other case? If he could qualify him to sue generally in all courts, why may he not sue for his property in the court within whose jurisdiction he finds it? The court having determined his right to sue, decided it forever—9 Wheaton, 738. The right of the plaintiff to sue can not depend on the defense which the defendant may choose to make. His right to sue is anterior to that defense—Ib. The courts of the United States are open for citizens of one State to sue the citizens of another State, and this right can not be lawfully denied. If the Government has not reduced his property to money and placed it in the Treasury, and he finds it still in specie, in kind, why may he not invoke the aid of any court to try the question of the right of the officer to move it further upon any pretext?

The general jurisdiction of the court can not be ousted by a single innovating statute, unless it is clear and unambiguous in in its terms, taking it away, and positive in its terms, prohibiting its exercise any longer by the general jurisdiction where it has always reposed by the general law and the Constitution. The general rule is, that if an affirmative statute, which is introductory of a new law, directs a thing to be done in a particular manner, that thing shall not be done in any other manner—Dwarris, 664.

Such statutes must be strictly construed. They must be limited to the particular subject of their enactment. If they create a new jurisdiction, or a new right, the words of the law shall be construed in the light of the subject matter, and with

strictness. But, unless the Legislature has in terms taken away the old jurisdiction by clear repealing clause, the new statute shall be construed as cummulative merely.

Sedgewick's Statutory Law, 93.
12 Barb., 260.
18 Wend., 220.
15 John, 220.
18 Barb., 297.

Here an additional remedy is provided and a new forum created, of which the citizen may avail himself or not at his pleasure. The terms used are not prohibitory or compulsory, but are *permissive*. If the property taken is sold, and the money paid into the Treasury, the owner *may* bring his suit in the Court of Claims. That is to say, he may take that course, because, after the money is paid into the Treasury, the Government becomes its custodian, and the claimant must sue it, but without it permits itself to be sued, the claimant has no legal remedy.

Here it has provided, through Congress, for another class of cases for the jurisdiction of the Court of Claims. That court has held that this act makes it the arbitrators, not the judges, in these cases, and in their award, not their judgment, the money is refunded, or not, as they determine. But no such right, to go into the Court of Claims, arises until the money is in the Treasury; aye more, no citizen can go there to claim his property unless he can prove, as a condition precedent, that "*he has never given any aid or comfort to the present rebellion.*" Thus, the right to sue is limited to a special class of citizens, and all others are excluded. This plaintiff can not have any standing in that court, and his case was purposely *not* embraced. The Constitution and the general law permits him to sue in the Circuit Court, but this special law does not allow him to go into the Court of Claims. But there is another reason why he could not go there, viz.: because the proceeds of his property were not

in the Treasury, the cotton not having been sold when this suit was brought. Finding his property in the hands of the defendant, he replevied it, as he had the right to do. He claimed that the defendant was a wrong-doer in holding on to it. The question of his right to it could as well be tried here as any where else, since there was no restriction by statute. If the property was lawfully captured, and gave the captors a right to it, under any statute, it could as well be tried in this forum as any other. Having admitted his rights to sue in that court, all other rights followed. Now, the statute being merely cumulative, and on its very face, and by its terms, restrictive to a particular class of claims, and limited to the particular circumstances pointed out in it, it is obvious that it was not intended to embrace all cases of captures or seizures of abandoned property. It was the rather intended to be confined to those cases where the true owner, at the time it was taken, was within the rebel lines, unable to follow his cotton until after the rebellion was suppressed. Indeed it has been held, by the Court of Claims, that the time to come into that Court by that Statute did not commence until after the rebellion was suppressed. However that may be, it can not be doubted that Congress meant to embrace within this Statute none but cases that ripened into money actually paid into the Treasury. If a citizen could wrest his property from a Treasury agent by the power of law, at any stage before it reached the Treasury, his right to do so would not be interfered with by this Statute. That always having been the law, this enactment was not designed to clash with it. But this plea is defective, and does not set up a good case under this Statute, because it does not appear that there was a legal capture of this property. It is claimed to have been "abandoned," but before it could be taken as "abandoned property," it must appear that, some one who had authority of law, seized it or took it into possession. The agent could not

do it, for the law contemplates that he should "receive and collect abandoned or captured property," (See 1st Section of the Act,) and the law makes it the duty (Sec. 6) of officers, sailors and marines, to turn the same over to an agent. He is to be the recipient of all such property after it is "*taken*" by the military or naval forces. He can not capture it any more than "*take*" abandoned property. He is the agent of the Government, to receive and collect it, after it is captured, found, or taken.

Everywhere in the Act, when speaking of the agent, the phrase used is "receive and collect," and yet, when the military or the navy are referred to, the phrase used is, "take or receive," as in the 6th Section.

The law does not in terms, or by any fair implication, authorize these agents to "take or capture" this description of property. That belongs alone to the military and the naval forces.

These agents may "receive and collect" from the military and naval forces. A reference to the orders from the War and Navy Departments on this subject, accompanying the Treasury Regulations, will show how this Act was interpreted by these Departments, and the Secretary of the Treasury, who received and published these orders along with his regulations.

This plea says that this cotton was "taken, received, and collected as abandoned property, into the possession of Ralph S. Hart, a special agent, appointed by the Secretary of the Treasury, to receive and collect, etc."

Now, if the pleader means to say that Hart *took* this property, then there was no warrant of law for the act, and it does not come within the operation of this law.

His act was a nullity, and wrongful, and conferred no rights to control the property. And if he meant anything else, the plea is bad for uncertainty, since the only construction it will

bear is the one I have just given it, or it is bad for not stating who did "*take*" it, in order that the Court may judge whether it was a lawful "taking." It does not follow, because it came into his possession that it was lawfully taken.

That fact being of pregnant consequence to make the right to hold the property valid, it should be averred like any other item of title. All the requisites to justify this extraordinary mode of divesting a citizen of his title to property must be averred and proved. One of them is that the property was "abandoned" by the owner, and another is that it was "taken" in this condition by some one authorized to "take" it. The two facts must concur. The plea nowhere makes any such averment, in which particular it is bad, and the demurrer should control it.

But this was not "enemy" property, when this suit was brought, whatever it might have been before the taking of the Oath of Allegiance. The taking of that oath purged the plaintiff, and exonerated his property from the crime which attached to it before it was taken. If he and it were subject to the disqualifying laws of nations, as belligerents before the act of taking this oath, instantly thereafter the sovereign right of citizenship, which had only been suspended, springs into existence, and he was entitled to all the rights and privileges of citizenship and the enjoyment of his property. However this property might have been exposed at one time to be seized and confiscated, and brought within the operation of the laws of nations or these disabling Statutes, the moment the owner took the step which secured him freedom and immunities of person and property, it could not be taken by any officer of the military or civil arm of the Government for violating any of these laws. And it can not be claimed here that there was a lawful "taking" of this property either before the Oath of Allegiance was taken or before the suit was brought.

As we have seen, the taking was wholly unlawful, those engaged in it being mere wrong-doers and tresspassers. So, if ever there was a right on the part of the Government to exercise belligerent authority over this cotton prior to the taking of the oath, it was extinguished the moment the oath was taken, and instantly all the relations of sovereignty and citizenship were resumed between Elgee and the Government.

The oath of allegiance having been taken in pursuance with the invitation and by authority of the President's proclamation of the 8th December, 1863, carried with it all benefits and rewards that were promised by the proclamation. If there was any doubt of the authority of the President to issue that proclamation, and make the promises, &c., contained in it, that doubt would be completely removed by the force and effect of the act of Congress of March 2d, 1867. That act validates and approves, as the Legislature will, all the proclamations, orders and acts issued, made, done or approved by the President from the 4th of March, 1861, to the 1st day of July, A. D. 1866. That act is entitled, "an act to declare *valid* and *conclusive* certain proclamations, &c."

But the act goes further. It prohibits, *in terms*, the Courts from taking jurisdiction of, or in any manner revising, "any of the proceedings had, or acts done, or omitted to be done, in pursuance or in aid of such proclamations or orders, or by authority, or with the approval of the President."

Besides this, Mr. Elgee brought himself within the operation of the rule laid down by the Supreme Court in Mrs. Alexander's case.

He left the enemy's country, and came into our lines, and within our own jurisdiction. Thus, he did all that was necessary to the complete resumption of his rights of citizenship, and to the freest enjoyment of his rights of property.—See "The Peterhoff," 5th Wallace.

R. M. CORWINE,
Of Counsel.

SUPREME COURT
OF
UNITED STATES.

DECEMBER TERM, 1867.

No. ~~NO.~~ 63

MILES SELLS, Adm'r of John K. Elgee, Plaintiff in Error,

VS.

OLIVER LOVELL, Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR,

BY

HUGHES, DENVER & PECK.

WASHINGTON, D. C.
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1868.

IN THE SUPREME COURT OF THE U. S.

DECEMBER TERM, 1867.

MILES SELLS, Administrator of JOHN K. ELGEE, Plaintiff in Error,
vs.
OLIVER LOVELL, Def't in Error.

No. ~~278~~ 63

Brief for Defendant.

The suit was originally, an action of replevin, under the Statute of the State of Missouri, in the State Court, (St. Louis Circuit Court,) commenced by Elgee, then alive, against Lovell, a Treasury Agent, to recover 572 bales of cotton and damages. Record, pp. 2, 3.

The plaintiff upon the affidavit and bond required by the Statute of the State, obtained an order for the seizure of the cotton by the Sheriff and its delivery to him. Record, pp. 3, 4, 5.

The said order was returned "unexecuted by order of plaintiff's attorney." Record, p. 6.

Upon the petition and bond of the defendant, the case was removed to the Circuit Court of the United States, for the district of Missouri, and thereupon the defendant entered his appearance. Record, pp. 6, 7, 8.

The plaintiff then filed in the Circuit Court of the United States a declaration *in the common law action of detinue.* Record, p. 9.

The death of the plaintiff was suggested, and Miles Sells claiming to be his administrator substituted as plaintiff in the action. Record, p. 10.

The defendant pleaded in abatement to the jurisdiction of the court, and the plaintiff demurred. Record, pp. 10, 11, 12.

The court sustained the demurrer. Record, p. 12.

The cause was continued with leave to plead at the ensuing term. Record, p. 12.

At the next term defendant pleaded in abatement to the jurisdiction; the plea was demurred to, and subsequently withdrawn, and five pleas in bar filed, the fifth being a plea alleging want of jurisdiction of the subject matter. Record, pp. 12, 13, 14, 15.

The sufficiency of the fifth plea, is the main question before this court.

Plea No. 1 is the general issue *non detinet*. p. 15.

Plea No. 2 alleges the participation of the original plaintiff, Elgee, in the rebellion, and his disability, for that reason, at the time of the commencement of the suit. Record, pp. 15, 16.

The plaintiff demurred to plea No. 2, (pp. 18, 19,) which demurrer was overruled, (p. 20,) and the plaintiff replied traversing the facts, so there was an issue of fact joined on this plea. Record, p. 21.

But the plaintiff, under the rules of practice prevailing in the court below, which allow several replications to one plea, filed an additional replication to this (second) plea, setting up the President's proclamation of December 8th, 1863, and alleging that Elgee took the oath therein prescribed, but admitting his residence in an insurrectionary district. Record, p. 21.

To this second replication to the second plea, the defendant demurred, thus making an issue of law. Record, p. 22.

This demurrer was sustained, but leave to amend was granted. Record, p. 27.

The amended replication to plea No. 2, is to be found on page 28 of the Record, and the demurrer, which was filed thereto, on pages 29, 30.

The court overruled this last mentioned demurrer. See Record, p. 30.

The defendant then took issue upon the replication. So the second plea was disposed of.

The third and fourth pleas, which are to be found on page 16 of the record, were demurred to (pp. 18, 19) and the demurrers sustained. Record, p. 20.

Thus all the pleas were disposed of excepting the fifth, which reads as follows:—

5. "And the said defendant by his attorney comes and defends the wrong and injury, when, &c., and says that the said plaintiff ought not to have or maintain his aforesaid action thereof against the

said defendant, because he says the said five hundred and seventy-two bales of cotton for the recovery of which this action was instituted, had, prior to the institution of said action, to-wit, in the month of March, 1864, in the State of Mississippi, been taken, received, and collected as abandoned property, into the possession of one Ralph S. Hart, a Special Agent appointed by the Secretary of the Treasury, to receive and collect abandoned or captured property in said State, in pursuance of the terms of the first section of an act of Congress entitled 'An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States,' approved March 12th, 1863; that prior to the time when said cotton was taken, received and collected, into the possession of the said Ralph S. Hart, Special Agent as aforesaid, the said State of Mississippi had been, by the proclamation of the President of the United States of July 1st, 1863, designated as in insurrection against the lawful government of the United States; that the said cotton was, in pursuance of the second section of the act aforesaid, forwarded by the said Ralph S. Hart, Special Agent as aforesaid, who had received and collected the same from the said State of Mississippi, to a place of sale within the loyal States, and in the course of being so forwarded, came at the city of St. Louis in the State of Missouri, into the possession of this defendant as Agent of the United States, and at the time of the institution of this action and the issue and service of the summons therein, was in the possession and custody of this defendent as such Agent, and not otherwise; that the possession and custody of said cotton by this defendant at the time of the institution of this action and the issue and service of the summons therein, was in pursuance of the act aforesaid; that this defendant then and there held such possession and custody for and on behalf of the United States and not otherwise, and that the said cotton was then and there claimed by the United States as abandoned property under the act aforesaid and is still so claimed; and this the defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him." Record, p. 17.

The plaintiff demurred to the foregoing plea, (see record, pp. 18, 19,) and the demurrer was overruled, (record, p. 20;) whereupon, the plaintiff filed his replication, found at page 22 of the record.

To this replication a demurrer was sustained, (record, pp. 23 and 27) and afterwards, in pursuance of leave granted, an amended replication was filed, which is to be found at pages 28 and 29 of the record, and is as follows:

"And the said plaintiff, for replication to the plea of said defendant, by him fifthly above pleaded, says that the said plaintiff, by reason of anything in said plea mentioned, ought not to be barred or precluded from having or maintainig his aforesaid action thereof

against said defendant, because, he says that the property in the declaration mentioned, was, prior to and at the time the same came into the possession of said Ralph S. Hart, as alleged in said plea, the property of and belonged to the said John K. Elgee, and that the President of the United States did issue his Proclamation bearing date the 8th day of December, 1863, whereby, there was promised a full pardon with restoration of all their rights of property, except as to slaves, to all those living in insurrectionary districts, except certain classes of persons therein mentioned, who should thereafter take and subscribe and keep thereafter inviolate, a certain oath in said Proclamation set forth and prescribed, and that prior to the commencement of this suit, the said John K. Elgee not being one of the persons excepted by the Proclamation aforesaid, and then being in an insurrectionary district, did take and subscribe the oath required and prescribed by said Proclamation to be taken, which was duly registered in accordance therewith, and did soon after, and long before the commencement of this suit, remove to and reside in the city of New Orleans, and so continued to reside there until his death, which New Orleans was not then, is not now, nor ever has been in any insurrectionary district or districts declared to be in rebellion by the President of the United States; and while thus residing in said New Orleans and before the commencement of this suit, did again take and subscribe the oath aforesaid, so prescribed in the Proclamation aforesaid, which oath was duly registered in accordance therewith; and the said John K. Elgee did, from the time of taking said oath and each of them, thenceforth forever afterwards, keep and maintain the said oath inviolate; by means whereof, all his rights of property in the goods, wares and merchandise mentioned in said declaration were, by the laws of the United States, and by force of said Proclamation, restored to him; and said property was so taken and held from said Elgee, contrary to said Proclamation and the laws of the United States; and this he is ready to verify; wherefore, he prays judgment, &c." Record, pp. 28 and 29.

To the foregoing replication the defendant demurred, (record, p. 30,) and the court sustained the demurrer. Same page.

Afterwards, judgment was rendered for the defendant on the last mentioned demurrer.

The plaintiff in error, who was the plaintiff below, insists that the replication to the fifth plea is sufficient, and that the fifth plea is bad. The defendant in error insists that the replication is bad, and the plea good. This is the issue of law to be tried in the cause.

Points for Defendant in Error.

The whole argument relied on in this brief is embraced in one affirmative proposition, viz:

No person, whether alien or citizen, loyal or disloyal, domiciled within the insurrectionary States, can maintain an action in the courts of the United States or of a State (not in rebellion) to recover property taken *flagrante bello* or *nondum cessante bello* as an act of war, or under color of the authority of the United States.

AUTHORITIES.

Elphinstone *vs.* Bedreechund, 1st Knapp's Privy Council Reports, p. 361.
Vattel Law of Nations, pp. 424, 426, 427.
Prize cases, 2d Black, p. 635.
Mrs. Alexander's cotton, 2d Wallace, p. 404.
The Venice, 2d Wallace, p. 258.
Manning's Law of Nations, pp. 137, 138.
Ibid, pp. 281, 282.
Grotius, B. 3d, Ch. 5 and 6 passim.
Maine's Ancient Law, pp. 239, 240, and 241.
Marten's Law of Nations, pp. 284, 285, 293, 294, 295, 296, 297.
Ibid, pp. 272, 275.
Pufendorf, B. IV., Ch. 6, § 14.
Ibid, B. VIII, Ch. 6, § 9, 19 and 21.
Kent's Com. Vol. 1, pp. 59 and 63.
Blackstone Com. B. IV. Ch. 6, pp. 77 and 78, (Marginal.)
Pufendorf, B. VII, Ch. 8, § 10.
Halleck, pp. 446, 456–7, 460, 462, 463, 466, 467, 468, 469.
Act of August, 1861, 12 Statutes at Large, 319.
Act of July 17, 1862, 12 Statutes at Large, 591.
Act of March 12, 1863, 12 Statutes at Large, 820.
Act of March 3, 1863, (reorganizing Court of Claims,) 12 Statutes at Large, p. 765.
Act of July 2, 1864, 13 Statutes at Large, p. 375–6.
Act of July 4, 1864, 13 Statutes at Large, p. 381.
Act of February 19, 1867, Session acts, 1866–7, p. 397–8.

Act July 13. 1861. 12 Statutes at L. p. 255-6-7.
Proclamation July 1st 1862. 12 Statutes p. 1266
Blockade Proclamation April 19. 1861. 12 Stat. p. 1258
Hallam's Constitutional History. Note 2 to Page 25.

Hughes, Denver & Peck
of Counsel for Def't

Supreme Court of the United States.

MILES SELLS,
Administrator of John K. Elgee, Appellant,

VERSUS

OLIVER LOVELL, Defendant,

BRIEF FOR PLAINTIFF.

GLOVER & SHEPLEY,
ATTORNEYS FOR PLAINTIFF.

Gibson & Wimsatt, Printers & Stereotypers, Washington, D.C.

Supreme Court of the United States.

MILES SELLS,

ADMINISTRATOR OF JOHN K. ELGEE, APPELLANT,

vs.

OLIVER LOVELL, DEFENDANT.

STATEMENT OF THE CASE.

On the 11th day of June, 1864, John K. Elgee, commenced his action in the nature of a suit *in detinue* against the defendant, Oliver Lovell, in the St. Louis circuit court, seeking to recover five hundred and seventy-two bales of cotton, alleged to belong to him, and to be illegally detained by Lovell, together with damages for such detention.

This suit was returnable to the September term, 1864, of said court, and at that time Lovell appeared and made application, under the provisions of the act of Congress of March 3, 1863, providing for the removal of suits in certain cases from State courts to courts of the United States, to have the case removed from the St. Louis circuit court to the circuit court of the United States for the district of Missouri, which was accordingly done.

Upon the removal of the cause into the United States circuit court, the plaintiff, Elgee, re-formed his pleadings so as to make them conform to the rules of pleading as recognized by that court, by filing a declaration *in detinue* in the ordinary form at common law.

In April, 1865, the death of Elgee was suggested, and Sells, as his administrator, was substituted as plaintiff.

Pleas to the jurisdiction were first filed by defendant, but were subsequently withdrawn, and a plea of the general issue and four special pleas were filed.

The *first* plea was the general issue.

The *second* plea averred in substance that at the time of the committing of the grievances mentioned, and at the time

of the commencement of this suit, Elgee was a citizen and resident of the State of Louisiana, which had been declared to be in insurrection by proclamation of the President, and was himself giving aid and comfort to the so-called Confederate States, and was a public enemy.

The *third* plea averred simply that the cotton was, at the commencement of the suit, and now is, claimed by the United States as abandoned property, under act of Congress of March 12, 1863; and that at that time defendant was in possession as agent of the United States, and not otherwise. It did not aver that it was taken in an insurrectionary district.

The *fourth* plea averred that cotton was and is the property of the United States.

The *fifth* plea averred that the cotton mentioned in the declaration had, prior to the commencement of the suit, been taken, received, and collected as abandoned property, into the possession of Ralph S. Hart, a special treasury agent, appointed to receive and collect abandoned and captured property, in pursuance of the act of March 12, 1863; that it was so taken within the State of Mississippi, which had been designated as being in insurrection by the proclamation of the President, and had been by said Hart forwarded to a place of sale within the loyal States, and in the course of such forwarding came to the city of St. Louis, into the possession of defendant, as agent of the United States, who held the cotton in his possession and custody for and on behalf of the United States, and that the cotton was claimed by the United States as abandoned property under that act.

To these special pleas the plaintiff demurred. The demurrer was sustained as to the *third* and *fourth* pleas, and overruled as to the *second* and *fifth* pleas.

To the *second* plea the plaintiff filed a traverse, and also special replications to that plea and to the *fifth* plea, which special replications having been demurred to, the demurrers were sustained; and thereupon the plaintiff filed amended replications to the second and fifth pleas, which are substantially the same, and set up as an answer to those pleas, that the President of the United States did issue his proclamation, dated the 8th day of December, 1863, granting a full pardon, with restoration of all their rights of property, except slaves, to all those living in insurrectionary districts, (except certain classes therein named,) who should take and subscribe to, and thereafter keep inviolate, the oath mentioned and prescribed in said proclamation;

and that Elgee, not being one of the excepted persons, and living in an insurrectionary district, did take and subscribe to that oath, which was duly registered, and did, shortly after and before the commencement of the suit, remove to the city of New Orleans, and from thence continued to reside there till his death; that New Orleans was not in an insurrectionary district; and while so residing there, and before the commencement of the suit, did again take and subscribe to the oath prescribed by the proclamation, and after taking of each of said oaths, he ever after kept the same inviolate, whereby his rights of property were restored, and all disabilities as to maintaining his rights to the cotton were removed.

To these two amended replications the defendant demurred, and the court overruled the demurrer as to the amended replication to the *second* plea, and sustained the demurrer as to the amended replication to the *fifth* plea.

Thereupon the defendant traversed the facts contained in the replication to the *second* plea, and the plaintiff declining to plead further, and abiding the decision of the court upon the demurrer, the court gave judgment for defendant.

The decision of the court below, overruling the demurrer of plaintiff to the *fifth* plea, which set up as a bar to the action, *not* that the cotton in question was in *fact* abandoned cotton, but that it was seized and claimed as such; and after that, the further decision, holding plaintiff's replication to the *fifth* plea, viz, that Elgee had taken and kept inviolate the oath of amnesty and at the commencement of the suit lived in a loyal district, to be bad, are the matters which came up for revision here.

The fifth plea will be on page 17, and the amended replication on pages 28 and 29 of the printed record.

ARGUMENT.

I. The questions raised by this record are to be solved by construction of acts of Congress, and not by reference to international law, nor the rights of belligerents.

For, 1. There is no allegation that the cotton in question was captured property.

It stands alone upon the simple allegation of claim as "*abandoned*" property. "Abandoned" property has no significance as a term used in or in relation to warfare. All the significance it has in reference to property of enemies comes from its use in a statute, and from that only.

2. There is no allegation even that it was seized in territory in occupation of the enemy.

If such an allegation had been made, it might have been contended that, however possession was acquired, if acquired in a territory in the possession of the enemy, it was subject to be appropriated by the other belligerent, if in any manner it came within his reach. Though we deny that this result would follow, yet there is something of plausibility in it if the allegation had been made; but

3. The status of the cotton is only defined as being seized AS abandoned in an insurrectionary district; but it is entirely consistent with the allegations of the plea of defendant, that it was seized *as* abandoned in the ports and places which for a long time before had been under the undisputed possession of the United States; as, for instance, the ports of Vicksburg or Natchez.

So that, for aught that appears in the plea, this cotton might have been seized in a place which had been for months in the undisturbed possession of the United States, where the ordinary commercial transactions had been conducted, and barter and sale with the loyal States had been going on to the amount of millions of dollars.

4. The decisions of this court expressly repudiate the doctrine that all property on land becomes the property of the successful belligerent, even in places in the occupation of the enemy.

Speaking of enemies' property on land, the court say, in the case of Mrs. Alexander's cotton, at page 419, "It (the right to capture) may now be regarded as substantially restricted to special cases, dictated by the necessary operation of the war, and as excluding, in general, the seizure of the private property of pacific persons for the sake of gain.

5. Congress has, by repeated acts, repudiated all idea of treating property in the insurrectionary districts as lawful prize of war, or as liable to seizure, except in certain cases; for

First, By the act of July 13, 1861, and May 30, 1862, regulating commercial intercourse between loyal and insurrectionary districts, Congress has provided for a system of barter and trade within insurrectionary districts.

Second, By the act of July 17, 1861, it is made the duty of the President to seize the property of all the persons named therein, and provides for proceedings *in rem* for its condemnation, showing that the Government does not claim to put all

the property in insurrectionary districts into the Treasury, nor claim it for itself.

Third, By the act of March 12, 1863, Congress has distinctly said to what extent property within insurrectionary districts shall be held liable to be seized and applied to the uses of the United States.

However large may be the rights of the United States as a belligerent in a civil war, it is certainly competent for Congress to say to what extent and within what limits Congress chooses to exercise those rights.

II. The act of 12th March, 1863, in its terms and intent, applies only to such property in the insurrectionary districts as was *in fact* captured or abandoned.

This will appear when we consider what was the object of the act; and

1. As to captured property.

The reason of the enactment as to captured property is referred to in the opinion of the court in the case of Mrs. Alexander's cotton. (2 Wallace.) It was to provide the means by which property lawfully captured by land forces or by naval forces, and not maritime prize, should be taken care of, preserved, and disposed of for the benefit of the Government. Before this act there was no one to whom the care of such property belonged, or who could lawfully dispose of it.

2. As to abandoned property.

It was supposed that, as our armies proceeded in their victorious march, there might be districts of country where the owners of property, or some of them, left their homes and property derelict and fled, leaving no one to protect it; and, in such a case, the Government should take it and convert it into money; and, if it were in fact thus derelict, as there might be expenses incurred in its care and preservation, that the Government were to be first reimbursed for those expenditures. The act proceeds, in all its provisions, upon the idea that the property about which it is legislating is, in fact, derelict.

3. By an act passed after this suit was commenced, to wit, on July 2, 1864, amendatory and additional to act of 12th March, 1863, Congress had defined, in the concluding words of the second section, what is to be considered as abandoned property.

III. To hold that this agent of limited powers, by the bare fact of asserting that he *claims* to have seized it under the law, should altogether conclude the inquiry of whether it was *rightfully* seized under the provisions of the only law by which he derived any right whatsoever, is at war with the principles of law recognized in all cases of agents and officers, whether acting on behalf of the United States or private individuals.

1. As the United States Government is one of definite and limited powers, and necessarily exercises its various functions through officers or agents, the authority of each officer or agent must be not only limited, but ascertained solely from the terms of his commission or appointment. To hold otherwise is to convert a special into a general agency—a limited into an unlimited power. It would destroy all responsibility of official agents for acts done to the oppression of the citizen. Each petty agent or officer would be converted into an irresponsible tyrant, and a government of limited powers and of *law* be absolute and unlimited, arbitrary, capricious, and lawless, affording no protection to the citizen or redress for official wrong. Such is not our theory of government. Each official agent must act within the scope of his agency, or be liable as a private trespasser or wrong-doer. The Supreme Court of the United States has often recognized this principle as applicable to all United States officers, civil and military.

Little *vs.* Bareme, 2 Cranch, 170.
Wise *vs.* Withers, 3 Cranch, 331.
Elliott *vs.* Peirsol & al., 1 Peters, 328.
Tracy & Ballastier *vs.* Swartwout, 10 Peters, 80.
Mitchell *vs.* Harmony, 13 Howard, 115.
Dynes *vs.* Hoover, 20 Howard, 65.
Buck v Colbath 3 Wallace 334

2. The authority of a special agent, like the defendant, over any property whatever, is limited by the acts of Congress to captured and abandoned property within the limits of insurrectionary districts. He is to take the custody thereof and proceed therewith as those acts require. Any seizure or detention by him of other property is a wrongful act, for which he is personally liable. If he is sued for the trespass, and he pleads, in justification, simply that he is an agent of the United States, the plea is bad, for no agent of the United States is empowered to act lawlessly, or justified in doing an unlawful act. The law determines the extent of his agency, and he must plead the facts which bring his actions within the terms of the law. It may be that he is a lawful agent for one pur-

pose and not for others; that he can lawfully proceed in one way and in no other. He must, in his plea of justification, show the lawfulness of the means for the attainment of a lawful end.

In this case he must show, not only that he was a special agent, within the meaning of the act, (which goes to his status or agency,) but also that he was acting within the scope of his agency, viz, holding possession of abandoned or captured property. His right to act at all, or rather, his lawful authority, the fact of his being such agent, *quoad hoc*, rests upon the fundamental or essential fact that the property is of the kind named. If it be not of that description, he is no agent of the United States, with respect to it; is not holding it as such agent—is a mere trespasser.

3. It is an abuse of terms to say that when one pleads a special license or authority, instead of averring such license or authority, he may aver simply that he *claims* to be thus empowered or privileged. Such an averment substitutes a pretence for the fact, a sham for the substance. The real point to be determined is, not what he *claims* to be, but what he really is. Suppose he were a simple impostor, and asserted himself to be, or claimed to be, a genuine agent; would any court of law consider itself and all the world estopped from disputing his claim? Indeed, does not every litigated matter involve the conflicting *claims* of adverse parties; and is it not the duty of the court, and the object of the litigation, to ascertain the rightfulness of the adverse claims thus set up? If a mere sham pretence—an unsupported claim—is to take the place of absolute verity, then society must be given over as helpless prey to every impostor who chooses to wrong it. It will not change the aspect of the case to assert that the doctrine contended for has application only to public officers; for it is precisely to such a class of agencies that the opposite doctrine should have especial reference, not only for the safety of the citizen, but for the honor and honesty of the Government. A sheriff, armed with a warrant for the arrest of the person named in it, is none the less a trespasser, if he arrests and imprisons an innocent third party. His office does not justify the arrest by him of any one he pleases; and, therefore, he cannot justify by averring that he *claims* that the arrested person is the real person named in the warrant. So with regard to seizure of property on execution. Every lawyer knows what the law is in such cases and the principle on which it rests; and no distinction or exemption exists in favor

of special agents of the United States. They must seize at their peril, just as United States marshals do.

4. If these views are not correct, the rules of pleading will test their fallacy. The plea is, substantially, that the defendant was, at the time of suit brought, a special agent of the United States, empowered to take and hold possession of abandoned property, and that the property in his possession and claimed by the plaintiff is *claimed* on the other hand to be abandoned property, which the defendant has a right to hold. Suppose the plaintiff admits (as he has done in this case) that defendant is such an agent, and traverses the averment that defendant *claims* such property to be abandoned. Here, if such pleading be permissible, would be an issuable fact, to be tried by the jury. What evidence would be admissible? The verbal declaration of defendant made out of court, or his plea in the case? Would not his claim of record, his plea, be better evidence that he *does claim*, than any other which could be offered? Would then his counsel offer his plea in evidence to the jury to prove the plea—offer the traversed allegation to prove the truth of the allegation; offer an averment, which is denied, to prove to the jury, who are sworn to find according to the evidence, that the disputed fact is true? It certainly would be a novelty in the investigation of truth. The office of pleading is to ascertain what facts are in dispute, and not to make a disputed assertion prove itself. But if the plea proves itself, then should the jury or the court try the case?

In form, it is a fact to be tried by the jury; while really it is a fact to be tried by inspection of the record.

No principle or rule of law is known whereby an agent, public or private, can substitute his own *ipse dixit*, his unsupported pretence or claim, for the real facts on which his rights depend; can say I *claim* to be right, and therefore no one shall dispute my claim; that my word is the end of the law, and all men and courts are estopped from inquiring into the truth; that I can do as pleases me, and no one shall be heard in denial of my right so to do; that it is enough for me to claim to be right, no matter whether I am right or wrong; I can do no wrong, can make no false claim. Can such be law?

The argument, *ab inconvenienti*, always a dangerous one, should be used, not for the overthrow of fundamental rights, but for aid in doubtful interpretations. It is doubtless very inconvenient for a trespasser to be sued, very inconvenient for a public officer to be held responsible for his conduct, very annoying to the Government to have an employee who will

disregard the law; but he is not, therefore, to be above and beyond the reach of the law; otherwise no government is possible save an absolute despotism. The fundamental idea of law is restraint, not unbridled license. The guarantee of freedom is legal responsibility on the part of public servants—a responsibility not to superior officers alone, but to every person injured by their wrongful acts.

It is said in argument that the United States has a right to the unqualified possession, full title to, every article of property in the insurrectionary district by the laws of war. Even if that sweeping proposition could be tolerated for a moment, that is, if, independent of the acts of the owner and a judicial determination of his offense, the United States Government, by declaring a district in insurrection, becomes vested *eo instante* with full title to all property, real and personal, in the proclaimed districts, (for the act of Congress refers to abandoned real estate as well as personal property;) still the position of the defendant would not be aided. His rights and powers are defined by law. He has no right to the possession of all property belonging to the Government, from the Capitol and President's Mansion, at Washington, to the guns and ammunition sent into insurrectionary districts to suppress the rebellion.

It may be that the plaintiff is the lawful custodian or bailee of the Government, and not the defendant. Their conflicting claims to the temporary custody must rest, not in their unsupported pretences respectively, but on the law and facts.

In no view of the case can the proposition on which the plea rests be sanctioned as law. Let the defendant show that he has rightful custody of the property, by showing it to have been abandoned property. The wrongful seizure of a man's property by an agent cannot vest the principal with a rightful title. A trespass cannot be justified by unwarrantable assumptions of absolute power, or by bald pretences. The law deals with the *facts*, not with hollow assertions or shams. The point involved here has been decided in Day *vs.* Gallup, 2 Wallace, 97; United States *vs.* Stone, 2 Wallace, 525; and in Buck *vs.* Colbath, 3 Wallace, 334.

IV. But the fifth plea assumes the opposite of all this, and by the assertion that the defendant, as agent of the United States, seized this *as* abandoned property, disposes at once of the case and all our rights at the same time.

The defendant has only to prove that he or Hart was an agent of the Treasury Department, and the case is made out;

and however great a violation of law has been committed, the injured party is remediless.

It is gravely stated that "the taking of cotton in the enemy's country by the agent of the Government, under the act of March 12, 1863, upon a claim that it was abandoned, had the effect of divesting all private rights to it *in specie*, and converting them into a claim upon the United States for the proceeds of it after a sale."

What the other side mean by being "in the enemy's country" is shown by the language of their plea, to be "in an insurrectionary district," as that is the only term used in the plea which approaches such an idea.

How difficult it is to maintain such a proposition will be seen from the following considerations:

Under the construction contended for by the defendant, there is no remedy, however illegal or improper the seizure.

1. The true owner, however loyal he may be, and however fully he may be able to show that the cotton was neither in fact captured nor abandoned, is obliged to stand by and see one-fourth of his property consumed in the illegal effort of taking it away from him; for the Treasury regulations allow the treasury agent to make a contract to gather up any property assumed to be derelict, and pay the contracting party one-fourth for such services.

(See section 12 of Regulations of the Secretary of the Treasury in regard to abandoned, captured, and confiscable property.) Sept 11. 1864.

2. He is obliged to stand by and see his cotton, possibly, sacrificed; to see it carried to a market other than that where it would bring the largest price; to see it sold in a manner and under terms and conditions seriously affecting its sale; to see it loaded with expenses and costs entirely unnecessary.

3. Unless, in fact, abandoned or captured, he has no standing in the Court of Claims for even the three-fourths which is left, for he goes into the Court of Claims with an averment, that what he seeks is the remainder of the proceeds of property *abandoned*, and unless he does so, he has no standing in that court. If he comes in and says that he seeks the remainder of what, without any warrant of law, had been stolen from him, he does not bring himself within the provisions of the act.

4. If he does come in and state what he knows is not true, he only gets, as the law then stood, a recommendation to pay the three-fourths then in the Treasury.

5. And this he can only do, if he has never in any way given aid and comfort to the enemy. If he has at any time, in the slightest degree, at the commencement of the struggle, been derelict in his duty to the Government, he cannot come into the Court of Claims under the provisions of this act, though he may ever after have been a loyal man and have been actively engaged on the side of the Government in the struggle. He may have poured out his blood like water in support of the Government, but he has no standing in the Court of Claims.

V. The conclusions that logically follow from holding the fifth plea good, show that it cannot be sustained.

For aught that appears in the plea, the cotton in question might

1. Have been coming from New Orleans to St. Louis, and have been seized while *in transitu* by a treasury agent, as abandoned property.

New Orleans has never, since 31st March, 1863, been in an insurrectionary district, and cotton sold by the Government itself in New Orleans might, and in fact was passing through this very insurrectionary district on its way to St. Louis.

2. It might have been stolen by the person employed by the treasury agent to gather up abandoned cotton.

We contend that we can show that this very cotton was stolen; that it was perfectly well known to the contractor that, under no possible construction of the act, was it abandoned cotton.

But this plea would also cover the case of a secret theft from a loyal citizen in an insurrectionary district. It does not allow that matter to be inquired into, any more than it does the *fact* of whether this was abandoned or not.

3. It might have been seized upon a plantation which belonged to a loyal man, who always lived in a loyal State, and who had any number of agents in charge.

It cannot be too often stated, that the plea contains no al-

legation that the property, at the time it came into the possession of the treasury agent, belonged to a rebel. It is the position of the defendant that such an averment is superfluous, and that it makes no difference whether the property claimed belonged to a loyal man or a rebel. They say that all property coming within the purview of the act of March 12, 1863, "whether belonging to rebels or loyalists, was subject to be so taken because abandoned."

Now, Congress, by a subsequent act, passed, it is true, after this seizure was made, has defined what they meant, when they say in the act of July 2, 1864, which is declared to be additional to the act of March 12, 1863, "that property, real and personal, shall be regarded as abandoned when the lawful owner thereof shall be voluntarily absent therefrom and engaged, either in arms or otherwise, in aiding or encouraging the rebellion."

So that it will be seen that Congress did not suppose that property of a loyal man ever could be "abandoned," so as to come within the operation of the act of March 12, 1863.

4. It might have been surreptitiously taken from out the warehouses of the Government at Vicksburg.

The Government had warehouses, in which were temporarily lodged cotton belonging to others.

5. It might have been cotton which, coming *in transitu* through the insurrectionary district, might by accident have become mingled with other cotton in fact abandoned.

Let us suppose that the identical five hundred and seventy-two bales of cotton, when received at St. Louis, included in fact twenty bales which had been purchased in Vicksburg or Natchez, under a Government permit, or at a Government sale, and in the course of removal from the warehouse to the boat for transportation to St. Louis, the drayman had mistaken the marks, taking the twenty bales so purchased, that the whole five hundred and seventy-two were brought to St. Louis, and suit had been brought by Elgee for his five hundred and fifty-two bales, and by the purchaser for his twenty bales. And the defendant pleads, as a bar in the suit of the purchaser, the same plea that he has done in Elgee's case. Now, upon the principles upon which alone this fifth plea can be supported, it is just as effectual a bar in the case of the purchaser as the defendant contends it is in the case of Elgee. In fact, a similar plea would be an effectual bar to a suit for any property, whether

the product of an insurrectionary district or not, and though owned by the most loyal man, so that it got into the hands of a treasury agent within an insurrectionary district, and was claimed as abandoned property.

If this construction of the act be correct, it would have effectually disposed of all the property in the insurrectionary districts; for it was only necessary to turn into these districts an army of treasury agents, or rather of contractors under these agents, and the whole property of the Southern States would have gone directly into the Federal Treasury. There was no necessity for courts, no necessity for any long process of confiscation, no necessity for capture. The treasury agent had only to speak, and it was done.

VI. But it is contended that this action cannot be maintained, because, first, it is substantially a suit against the United States; and, second, is prohibited by the act of 2d March, 1833. (4 Statutes at Large, 632.)

To this it is answered:

1. That this is no more a suit against the United States than is any suit against a collector, marshal, or military officer who claims that he committed the act complained of in his capacity as officer of the United States.

This has been held not to oust the State courts of their jurisdiction, even when the act under which the officer seeks to justify gave a forum in which to determine the right of property.

Wood *vs.* Matthews, 23 Vermont, 735.
Tracy *et al. vs.* Swartwout, 10 Peters, 80.
Gelston *vs.* Hoyt, 3 Wheat., 246.
Buck *vs.* Colbath, 3 Wallace, 334.

2. Even if this were a replevin suit, yet as against anything set up as a defence in this suit it is maintainable.

The officer must not only show that he took the property, but that it is in the custody of the law.

If a collector on the Canadian border takes a horse, and the owner brings replevin in the State court against the individual, it is not enough to oust the jurisdiction of the State court to say and prove that he was such collector, and claims to hold the horse under the law of the United States relating to imports and exports, but he must aver and prove that the horse was imported into the United States, so as to bring the subject matter within the purview and provisions

of the act which he sets up to oust the jurisdiction of the State courts, and sets up as a shield for himself.

Wood *vs.* Matthews, 23 Vermont, 735.

3. The act of March 2, 1833, relates only to those cases in which the injured party can at once, in a court of competent jurisdiction, try the question of whether the identical property seized belongs to the claimant or is forfeited to the Government.

The words of the act are, "and all property taken or detained by any officer or other person, under authority of any revenue law of the United States, shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject to the orders and decrees of the courts of the United States having jurisdiction thereof."

Now, nobody contends that the cotton *in specie* was in the "custody of law, or subject to the orders and decrees" of any court. The most that can be claimed is that a certain portion of the proceeds of the sale of that cotton may, by possibility, be recovered through the instrumentality of the Court of Claims, a tribunal which, as the law then stood, was a mere board of recommendation for the payment of claims against the Government which the court deemed meritorious.

4. The object and intent of the law was to prevent a conflict of jurisdiction, a struggle for the *res*.

6. This act of the 12th March, 1863, is no "revenue law"—certainly none within the meaning of the act of the 2d March, 1833.

The Treasury is the proper depository of all moneys belonging to the Government. If the United States should choose to dispose of a portion of its territory to a foreign power, the purchase-money would go into the Treasury, but that would not make the act which authorized the sale and cession a revenue law. The fact that the avails of abandoned property go into the Treasury does not make the law a revenue law, any more than the fact that the proceeds of the sale of prizes, under the law in relation to maritime prize, (13 Statutes at Large, page 306,) go into the Treasury, makes that law a revenue law.

7. This suit is not a replevin suit—is not a suit affecting the *res*, any more than a suit in trespass.

It is true, that it demands the possession of the property claimed, but it does not effect a change of possession of the

property. It only gives the defendant the right, if judgment be obtained against him, to respond to the exigency of the writ of execution, by surrendering the designated property.

By the Code of the State of Missouri, a person claiming property may bring an action in the nature of a suit *in detinue*, and after that suit is commenced he may, if he desire it, obtain process to enable him to take possession of the property claimed by him; and if he does so, and *obtains possession*, then the suit becomes a suit in the nature of a replevin suit.

So in a suit commenced in the ordinary form for the recovery of a debt. The code gives to the plaintiff, in certain cases, by making oath and giving bonds, the right to have an attachment against the debtor's property, and if the property be seized, it becomes an attachment suit.

In this case the sheriff was directed by the plaintiff not to execute the writ in aid of the original writ, and the suit remained as it originally was—a suit in the nature of a suit *in detinue*. There was no taking of the *res*, and when the suit was transferred to the circuit court of the United States, a declaration *in detinue*, in the common-law form, was filed, and it was so treated by the court below, and in the decision then made it is stated to be suit *in detinue*.

But it is contended that Elgee, having once been disloyal, cannot maintain this action. This objection divides itself into two branches: *first*, as to the personal rights of Elgee, that he has no right to appear in this court, or in the court of any loyal State at all; and, *second*, if he has a right to appear and maintain an action at all, that the taking of the amnesty oath and the residing in a loyal district has no effect upon the rights he seeks here to enforce. To this we answer:

VII. That the acceptance of Elgee of the conditions of the President's proclamation, and his residence at the time of the commencement of this suit in a loyal district, entitle him to all the rights and privileges belonging to the most loyal citizen from that time, both as to his personal right to maintain an action—his *status* in court, and as to his rights to his property.

This will be apparent when we consider

1. That the Constitution of the United States, art. 2, sec. 2, confers upon the President the power to grant reprieves and pardon for offences against the United States, save only in cases of impeachment.

This necessarily includes the cases of treason and disloyalty.

2. The act of July 17, 1862, commonly called the confiscation act, authorizes the President to grant "pardons and amnesty" by proclamation.

3. These grants of power in the Constitution and acts of Congress authorize the President to release any one from any penalties or consequences growing out of the rebellion, or any participation therein.

4. The proclamation of the President of December 8, 1863, uses all the powers thus given; and, to the person who avails himself of its provisions, it operates *first* upon the personal *status* of the offender.

It relieves him from all consequences as to his person, whether he is living in an insurrectionary district or a loyal district. It places him in a condition to maintain a suit, if his rights shall be violated. But if he remains in an insurrectionary district, or rather in a district under the military dominion of the enemy, his *status* is such that he is not permitted to enforce his rights. However loyal he may be, so long as he remains within the lines of hostile occupation he cannot maintain a suit in court. It is therefore averred, in the replication to the fifth plea, that the plaintiff, Elgee, had taken the amnesty oath and kept it, and at the time of the institution of this suit resided in a loyal district. We thus bring ourselves within the conditions named in the case of Mrs. Alexander's cotton, 2 Wallace, 404, and establish our right to sue.

Second. It operates upon the rights of property of the individual so pardoned.

Without any special grant, the amnesty and pardon operate to restore the rights of the guilty person as to property owned by him, liable to be confiscated or seized and sold as a consequence of his guilt. It is a necessary incident to the pardon itself. The operation and effect of the pardon itself, if without exception, is to place the man in all respects from the time the pardon takes effect as if he had never sinned.

But the proclamation does more than this. In its very terms it grants to the pardoned man "restoration of all rights of property, except as to slaves;" and, as if to leave no doubt as to how far this restoration was to operate, it makes the only other exception, and "except in property cases

where rights of third parties have intervened," intending thereby to place beyond cavil the title of property acquired by third parties, by purchase under the United States or judgments of its courts. It was the very design of the President to convey to these persons the fullest assurance that they should be, from the time of taking the oath, protected in their persons and the enjoyment of their property. These were the inducements held out for them to return to their allegiance.

But what does the proclamation effect when it grants "restoration of all rights of property except slaves?" Not certainly only or mainly property *vested* in the United States, for there were scarcely any of such cases; but where the United States had a right, under the laws already passed, or which might be passed, to enforce a forfeiture of property as a penalty for the crime, it restored to the owner all his rights to the property as they existed before the commission of the offence. It related not to any particular mode or method of enforcing that forfeiture, whether, under the confiscation law, by judgments and judicial sale of the whole of the property of the criminal, or whether, under the act afterwards passed, it might reach a part he had left, *in fact* derelict, by seizure by a treasury agent and sale by him. The law does not restore "all property," but "all rights of property;" that is, it restores to the pardoned man all such rights of property as were in any wise jeopardized or affected as the consequence of his guilt.

If the other side are correct in their interpretation of the act of March 12, 1863, that all property, whether of rebels or loyalists, anywhere in the wide domain of the insurrectionary districts, in or out of the military occupation of the enemy, is subject to be seized, taken, and sold by a treasury agent upon a *claim* that it is abandoned property, then we admit that we stand in no better position than the most loyal citizen. If, however, they are mistaken in this, then we contend that the replication is a good answer to the fifth plea.

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2 Wall 440

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2 Wheaton 9

3 Peters 292

20 How 536

24 How 450 521

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10 John 183

11 Mass

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1 Chitty Pl 481

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2 Rhea Sh 124

2 Wall 440